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No. 4452

~~1435~~ 1429

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM CARLSON, JOHN SAUDEN and AETNA LIFE INSURANCE COMPANY, a Corporation, Claimants of the Motorship "Three Sisters,"

Appellants,

vs.

A. PALADINI, INC., a Corporation,

Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Third Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4452

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Index. Page

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

Clerk's Office.

No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of Said Court:

Sir: Please include in the apostles on appeal in the above cause the following:

1. Caption and statement required by Subdivision 1, Sec. 1, of Rule 4, Rules in Admiralty, United States Circuit Court of Appeals, 9th Circuit.

2. Libel and petition of A. Paladini, Inc.

3. Answers of William Carlsen and John Sauder to said libel and petition.

4. Stipulation and order filed May 29, 1924, allowing filing of claim and answer of Aetna Life Insurance Co.

5. Answer of Aetna Life Insurance Co. to said libel and petition.

6. All testimony taken at the trial of said cause on August 5, 6, 7 and 12, 1924.

7. Deposition of John True Urquhart, filed August 12, 1924. (Petitioner's Exhibit *and* 4, and Claimant's Exhibit "A" are to be sent up to the

Circuit Court of Appeals in their original forms, pursuant to stipulation and order.) [1*]

8. District Court order denying liability, entered September 10, 1924.

9. District Court opinion, filed September 10, 1924.

10. Final decree, entered October 15, 1924.

11. Assignment of errors.

BELL & SIMMONS,
REDMAN & ALEXANDER,
HEIDELBERG & MURASKY,
JOSEPH J. McSHANE,
Proctors for Claimants and Appellants.

[Endorsed]: Filed Nov. 18, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

STATEMENT OF CLERK U. S. DISTRICT COURT.

In the Southern Division of the United States District Court, Northern District of California, Third Division.

No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., Owner of the Motorship, "THREE SISTERS," for Limitation of Liability.

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*Page-number appearing at foot of page of original certified Apostles on Appeal.

PARTIES.

Petitioner: A. Paladini, Inc., a Corporation.

Claimants: William Carlson, John Sauder, Aetna Life Insurance Company, a Corporation.

PROCTORS.

For Petitioner: IRA S. LILLICK, Esq., and HOEFLER, COOK & LINGENFELTER, Esqs.

For Claimants: BELL & SIMMONS, REDMAN & ALEXANDER, JOSEPH J. McSHANE, Esq., and HEIDELBERG & MURASKY. [3]

PROCEEDINGS.

1924.

March 4. Filed petition for limitation of liability.
Filed order of reference for purpose of making appraisement.

14. Filed report on appraisement.

21. Filed order approving report of Commissioner on appraisement.
Filed order for monition and restraining order.
Issued monition.
Filed stipulation (bond) in the sum of $15,918.00.

28. Filed answer of William Carlson and John Sauder.
Filed monition on return, showing personal service by U. S. Marshal on Carlson and Sauder.

April 16. Filed deposition of John True Urquhart.

May 27. Filed answer of Aetna Life Insurance Company.

29. Filed stipulation and order allowing Aetna Life Insurance Company to file claim and answer.

July 29. Filed report of Commissioner on Claims, with stipulation and order confirming same.

Filed affidavit of publication of monition.

August 5. This cause came on to-day for hearing before the Honorable John S. Partridge, Judge.

6. Hearing resumed.

7. Hearing resumed.

12. Hearing resumed, and cause submitted on briefs.

Sept. 10. Filed opinion. Ordered liability denied *in toto*.

Oct. 15. Filed final decree.

Nov. 18. Filed notice of appeal.

Filed assignment of errors.

Filed bond for costs on appeal, and staying execution. [4]

In the District Court of the United States of America, in and for the Northern District of California, Third Division.

IN ADMIRALTY—No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

LIBEL AND PETITION.

To the Honorable Judges of the District Court of the United States in and for the Northern District of California, Third Division:

The libel and petition of A. Paladini, Inc., a corporation, organized and existing under and by virtue of the laws of the State of California, and having its office and principal place of business in the City and County of San Francisco, the owner of the motorship "Three Sisters," her tackle, apparel and furniture, in a cause of limitation of liability, civil and maritime, respectfully shows:

I.

Petitioner is, and at all the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, having its office and principal place of business at San Francisco, and within the Northern District of the State of California and the jurisdiction of this Court, and is and at all of said times was engaged in the business of owning and operating

ships in the waters of the [5] Pacific Ocean and its inlets in pursuit of said corporation's general business, to wit, that of fishing, and is and at all of said times was the owner of the motorship "Three Sisters," which said motorship is now lying in the port of San Francisco and within the jurisdiction of this Honorable Court.

II.

On the 8th day of June, 1923, said motorship left the port of Point Reyes, in the State of California, on a voyage, having in tow a barge bound for the port of San Francisco, in the State of California, where said voyage was terminated on the 8th day of June, 1923. At the time of leaving Point Reyes she was in all respects properly manned and equipped and was in all respects staunch and seaworthy.

III.

While on said voyage, and while towing said barge, in the morning of the 8th day of June, 1923, and while out of said port of Point Reyes about one hour and thirty minutes, and off the coast of California, said motorship and her tow encountered a succession of long ground swells. Upon encountering said ground swells the master of said motorship caused her to proceed on said voyage under half-speed. The master was at the wheel. Suddenly, while said motorship was on the receding side of one of said ground swells, and while going at half speed, as aforesaid, the one side of the bridle upon said barge was seen by the master of said motorship to part. The master immediately there-

after, and before any further breaking of said bridle, disconnected the engines of said motorship from her propeller shaft, but while not under any power from said motorship, but while being carried forward by the force of said ground swells and of the seas, the other side of said bridle upon said barge parted, completely disconnecting said motorship from her tow. At the time of said voyage, petitioner maintained a regular service by the motorship [6] "Corona" for the transportation of persons and property from said port of Point Reyes to said port of San Francisco, which service was at said time used for accommodation of the employees of Healy-Tibbitts Construction Company, and the said motorship "Three Sisters" was not used in said service. At the time said motorship "Three Sisters" left the port of Point Reyes, one William Carlsen and one John Sauder, together with five (5) other men, all being employees of said Healy-Tibbitts Construction Company, were at said port of Point Reyes awaiting transportation to the port of San Francisco upon the said motorship "Corona." When said Carlsen and said Sauder, and the said other men, ascertained that said motorship "Three Sisters" was about to depart from the port of Point Reyes for the port of San Francisco, towing said barge, they refused to await passage on said motorship "Corona" and boarded said barge. While said motorship "Three Sisters" was towing said barge, and while said motorship "Three Sisters" and her tow were still within the harbor of the port of Point Reyes, said Carlsen

and said Sauder, and the said other men, signaled to the master of said motorship "Three Sisters" that they desired to come aboard said motorship "Three Sisters," and the master accordingly brought said motorship "Three Sisters" alongside of said barge and said Carlsen and said Sauder, and the said other men, came aboard said motorship "Three Sisters" When said Carlsen and said Sauder, and the said other men, came aboard said motorship "Three Sisters" the master thereof warned them, and each of them, to stay away from the stern of said vessel and from the tow-line which was attached to the mast of said motorship "Three Sisters." At the time the said Carlsen and said Sauder, and the other said men, came aboard the motorship "Three Sisters," she had not as yet encountered any ground swells, but was upon a calm sea. The motorship "Three Sisters" then proceeded upon her way upon the [7] voyage as aforesaid. All of the men who came aboard the motorship "Three Sisters," with the exception of said Carlsen and said Sauder, and two of said other men, stationed themselves at points away from the stern and said tow-line, but said Carlsen and said Sauder and the two of said other men, stationed themselves at the stern of said motorship "Three Sisters" and near said tow-line and proceeded to engage in a game of cards. Upon encountering said ground swells, as aforesaid, the master of said motorship "Three Sisters" warned the said Carlsen and said Sauder, and the other two men engaged in the game of cards, to stay away from the stern of

said vessel and from said tow-line, but said Carlsen and said Sauder, and the other two men engaged with them in said game of cards, remained at the stern and were there at the time when said bridle upon said barge parted, as aforesaid. Upon the parting of the bridle upon said barge, the tow-line whipped back and struck the said Carlsen and the said Sauder, inflicting upon them certain bodily injuries. Said Carlsen and said Sauder knew, or by the exercise of ordinary care for their own safety, could and should have known, that said place upon the motorship "Three Sisters" where they were stationed at the time of the breaking of said bridle, was a place dangerous to life and limb for anyone to remain in while said motorship was engaged in towing said barge, and in going to and remaining at said place said Carlsen and said Sauder failed to exercise ordinary care. Had the said Carlsen and the said Sauder exercised ordinary care for their own safety as men of ordinary prudence would have done under the same circumstances, by remaining away from said place where they were injured, they could and would have escaped all injury from the breaking of said bridle.

IV.

The said injuries to the said Carlsen and the said Sauder were in no wise caused by fault on the part of said [8] motorship "Three Sisters," her master, officers or crew, but were occasioned solely by reason of the negligence of said Carlsen and said Sauder in that they, the said Carlsen and said Sauder, did not keep away from the stern of said motor-

ship "Three Sisters" nor from said tow-line as they were warned by the master of said motorship "Three Sisters" to do, and as they, as prudent men, should have done.

V.

Said accident happened and the loss and damage referred to were done, occasioned and incurred without fault on the part of petitioner, and without its privity or knowledge. Nevertheless, certain actions at law have been commenced against your petitioner, the following being a list of said proceedings:

(a) An action at law brought in the Superior Court of the State of California, in and for the City and County of San Francisco, against petitioner, by said William Carlsen, whose residence is 207 Anderson Street, San Francisco, California, and who claims to recover in tort for personal injuries received in said accident. The attorneys in said action for said William Carlsen are Messrs. Joseph J. McShane and Heidelberg & Murasky, whose address is Flood Building, San Francisco, California, and the amount of damages claimed in the complaint is the sum of fifty thousand nine hundred sixty dollars ($50,960).

(b) An action at law brought in the Superior Court of the State of California, in and for the City and County of San Francisco, against petitioner by said John Sauder, whose residence is 22 Polk Street, San Francisco, California, and who claims to recover in tort for personal injuries received in said accident. The attorneys in said action for said John Souder are Messrs. Joseph J. McShane and

Heidelberg & Murasky, whose address is Flood Building, San Francisco, California, and the amount of damages claimed in the complaint is the sum of [9] fifty thousand eight hundred dollars ($50,800).

In addition to the above, which are all the claims of which petitioner now has knowledge, petitioner is in fear that other suits or actions may be brought against it or the motorship "Three Sisters" by other parties who may have sustained loss, damage or injury by reason of said accident. There are no other claims or demands against, nor liens upon said motorship "Three Sisters," or against petitioner, arising on, out of, or in connection with said voyage so far as is known to petitioner. Said motorship was not damaged, lost or abandoned on on said voyage.

VI.

On information and belief, petitioner avers that the value of said motorship "Three Sisters" at the close of said voyage, did not exceed the sum of Ten Thousand Dollars ($10,000), and that she had no freight pending at the close of said voyage, and petitioner avers that the amount of the claims in the actions already begun against said petitioner as aforesaid, far exceed the value of its interest in said motorship "Three Sisters" and her freight pending.

VII.

Petitioner desires to contest its liability and the liability of said motorship "Three Sisters" for the injuries, losses and damages, whether to persons or to property, caused, occasioned or incurred upon

said voyage, and particularly the loss and damage incurred by said Carlsen and said Sauder, and petitioner also hereby claims the benefit of limitation of liability as provided in Sections 4282 and 4289, inclusive, of the Revised Statutes of the United States, and also hereby claims the benefit of limitation of liability provided in the Act of June 26, 1884, and particularly the benefit of the provisions of Section 18 of said Act (23 St. L. 57), and also [10] hereby claims the benefit of limitation of liability provided in Section 4289 of the Revised Statutes of the United States as amended by the Act of June 19, 1886, (24 St. L. 79), and particularly Section 4 of the last-mentioned Act, and also hereby claims the benefit of any and all Acts of the Congress of the United States, if any, amendatory of or supplemental to the several sections and acts aforesaid, or any portion thereof, and petitioner is now ready, able and willing, and hereby offers to give its stipulation, or stipulations, with sufficient sureties conditioned for the payment into this court by petitioner of the value of said motorship "Three Sisters," if required, as she was immediately after the termination of said voyage, upon which said accident occurred, with interest thereon, together with her freight pending, if any was pending, though petitioner respectfully represents that none was pending, such payment to be made whenever the same shall be ordered herein.

VIII.

While not in any way admitting your petitioner

is under any liability for the losses and damages occurring as aforesaid, and petitioner here claiming and reserving the right to contest in this court any liability therefor, either personally or of said motorship "Three Sisters," petitioner claims and is entitled to have limited its liability, if any, in the premises, to the amount or value of its interest, as aforesaid, in the said motorship "Three Sisters" as it was at the close of said voyage.

WHEREFORE, your petitioner prays that this Court will order due appraisement to be had of the value of said motorship "Three Sisters," her engines, boats, tackle, apparel, furniture and appurtenances, as the same were immediately after the close of said voyage, and order and cause due appraisement to be had of the amount of the freight pending, if any, at the close of said voyage, and that stipulations or undertakings may be given [11] by petitioner, with sureties conditioned for the payment into court of such appraised value whenever the same shall be ordered, and that this Court will upon the filing of such stipulations by petitioner, issue, or cause to be issued, a monition against William Carlsen and John Sauder, and all other persons claiming damages of petitioner or against said motorship "Three Sisters" by reason of injuries to persons, or to property occurring or arising upon said voyage, or resulting from the losses or damages resulting from said accident, citing them, and each of them, to appear before this Court, and there make due proof of their respective claims, at a time to be therein named, as to

all of which claims petitioner will contest its liability and the liability of said motorship "Three Sisters."

That in case it shall be found that any liability exists upon the part of petitioner, by reason of injuries to persons, or loss of, or damage to, property, done, occasioned or incurred upon said voyage, and particularly the losses and damages suffered by said William Carlsen and said John Sauder (which petitioner denies and prays may be contested in this court), then that such liability shall in no event be permitted by this Court to exceed the value of said motorship "Three Sisters," and her freight, if any, pending at the close of the voyage upon which said accident occurred, as aforesaid, and as such values may be determined by the appraisement of such interests as hereinbefore prayed; and that the moneys secured to be paid into court, as aforesaid, shall, and may, after payment of costs and expenses therefrom, be divided *pro rata* among the several claimants in proportion to the amounts of their respective claims as by this Court adjudged; and that in the meantime, and until final judgment of this Court shall be rendered and entered herein, this Court shall enter an order herein restraining the prosecution of the aforesaid action of said William Carlsen and the action of said [12] John Sauder, and the commencement and prosecution hereafter of all or any suit, or suits, action, or actions, or legal proceedings of any nature or description whatever, except in the present proceeding against petitioner

or the motorship "Three Sisters" in respect of any claim, or claims, losses or damages, suffered in or arising out of said accident; and that petitioner may have and receive such other and further relief in the premises as shall be meet and equitable.

HOEFLER, COOK & LINGENFELTER,
IRA S. LILLICK,
Proctors for Petitioner. [13]

State of California,
City and County of San Francisco,—ss.

J. Chicca, being first duly sworn, deposes and says:

That he is an officer, to wit, the Secretary, of A. Palidini, Inc., a corporation, the petitioner herein; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

J. CHICCA.

Subscribed and sworn to before me this 4th day of March, 1924.

[Seal] E. J. CASEY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 4, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [14]

In the District Court of the United States of America, in and for the Northern District of California, Third Division.

IN ADMIRALTY—No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "THREE SISTERS" for Limitation of Liability."

ANSWER TO LIBEL AND PETITION.

Now come William Carlson and John Sauder in opposition to the libel and petition filed by A. Paladini, Inc., a corporation, and for answer thereto, deny, admit and allege as follows:

Deny that at the time of leaving Point Reyes said "Three Sisters" was in all or any respects properly manned or equipped, or was in all or any respects staunch or seaworthy.

Deny that said motorship, on said voyage, encountered any long, or any ground swells or that said motorship at said time proceeded during said voyage at half speed; admits that a tow-rope or bridle being used by said motorship as a part of her apparel or equipment parted, and alleges that at said time said bridle or tow-rope was in an unsound, rotten and defective condition, and deny that said bridle or tow-ropes parted or broke by reason of said or any ground swells, or otherwise, than because of its being insufficient and in an unsound, rotten and defective condition, and allege

that said tow-rope or bridle parted or broke because of its said condition and by reason of its being subjected to too great a strain.

Denies that petitioner, at said time, maintained a regular [15] transportation service for persons by the motorship "Corona" and deny that said service was maintained for the accommodation of employees of Healy-Tibbitts Construction Company, and deny that said "Three Sisters" was not used in said service.

Deny that said Carlson and Sauder, or either of them, refused to await passage on the "Corona" but allege that said persons were on said "Three Sisters" at the invitation and request of the captain, or master, thereof and as passengers thereon.

Deny that said Carlson and Sauder, or either of them, signalled the master, or captain, of said "Three Sisters" to come alongside a wharf and allow them to board said motorship, but allege that said master, or captain, of said motorship waited at Point Reyes for twenty-four hours for the purpose of having said persons come aboard said motorship for the purpose of being transported as passengers thereon from Point Reyes to San Francisco at the invitation, request and demand of the master, or captain, of said "Three Sisters."

Deny that anyone ever warned said Carlson and Sauders, or either of them, to stay away from the stern or tow-line of said motorship.

Deny that said Carlson and Sauder, or either of them, knew, or should have known, that the stern of said vessel was, at said time, a place dangerous

to life or limb, and allege that it was impracticable for them to occupy any other place on said motorship, and deny that said Carlson and Sauder, or either of them, failed to exercise ordinary care for their own safety, and allege that said persons occupied the stern part of said motorship under the direction of the master thereof.

Deny that the injury suffered by said Carlson and Sauder, or either of them, was not caused by fault on the part of said motorship, and allege the facts to be as set forth in their complaints [16] filed in the Superior Court of the State of California, and attached hereto as Exhibits "A" and "B," and made a part hereof.

Deny that said injuries were without fault on the part of petitioner or without its privity or knowledge.

WHEREFORE, said Carlson and Sauder, and each of them, pray that the relief prayed for by petitioner in its libel and petition be denied, and ask that petitioner be denied a limitation of liability herein; and that said Carlsen and Sauder, and each of them, be not restrained from proceeding with the prosecution of their said action or actions.

Said Carlson further prays that his claim in the sum of Fifty Thousand Nine Hundred Sixty ($50,-960) be allowed for damages suffered by him because of personal injuries received by him by being struck by said tow-rope, as is more fully set forth in his said complaint attached hereto as a part thereof and marked Exhibit "A," and

Said Sauder further prays that his claim in the sum of Fifty Thousand Eight Hundred ($50,800) Dollars be allowed for damages suffered by him because of personal injuries received by being struck by said tow-rope, as is more fully set forth in his said complaint attached hereto as a part hereof and marked Exhibit "B."

HEIDELBERG & MURASKY and
JOS. J. McSHANE,
Proctors for Said Carlson and Sauder. [17]

State of California,
City and County of San Francisco,—ss.

William Carlson, being first duly sworn, deposes and says: That he is one of the claimants in the above-entitled action; that he has read the foregoing answer to libel and petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and that as to those matters he believes it to be true.

WILLIAM CARLSON.

Subscribed and sworn to before me this 27th day of March, 1924.

[Seal] L. A. MURASKY,
Court Commissioner of the City and County of San Francisco, State of California. [18]

EXHIBIT "A."

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. ——.

Dept. No. ——.

WILLIAM CARLSON,

Plaintiff,

vs.

A. PALADINI, INC., a Corporation,

Defendant.

COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES.

Plaintiff complains of defendant and for cause of action alleges:

I.

Defendant herein is now, and was, at all times mentioned in this complaint, a corporation organized and existing under and by virtue of the laws of the State of California, doing business in said state and having its principal place of business in the City and County of San Francisco, State of California.

II.

Said defendant is now, and was, at all times herein mentioned, engaged in *ths* business of the wholesaling and catching of fish, and owned and operated boats, ships or vessels, and in particular owned and operated a boat, vessel or ship known as "Three

Sisters," and was the owner of certain wharves in the State of California, and particularly a wharf located at, or near, Point Reyes in the State of California. [19]

III.

Healy-Tibbitts Construction Company is now, and was, at all times herein mentioned, a corporation organized and existing under and pursuant to the laws of the State of California and having its principal place of business in the City and County of San Francisco, State of California.

IV.

The business of said Healy-Tibbitts Construction Company, among other things, was that of constructing wharves and as such constructed under contract said wharf located at, or near, Point Reyes, California, for said defendant.

V.

Plaintiff herein was, on the 8th day of June, 1923, and for a long time prior thereto had been, in the employ of said Healy-Tibbitts Construction Company as a foreman of a pile-driving crew, and was engaged as such employee of said Healy-Tibbitts Construction Company in the construction of said wharf owned by defendant.

VI.

Plaintiff herein, on said 8th day of June, 1923, and for a long time prior thereto, resided in the City and County of San Francisco, State of California, and as a part of the contract existing between said Healy-Tibbitts Construction Company and said defendant for the construction of said

wharf, defendant herein agreed with said Healy-Tibbitts Construction Company to transport said plaintiff to and from said City and County of San Francisco to Point Reyes and the wharf located thereabouts.

VII.

On the 8th day of June, 1923, plaintiff herein was a passenger as aforesaid on one of the boats, ships or vessels owned and operated by said defendant, to wit: "Three Sisters," and while said plaintiff was a passenger on said boat, ship or [20] vessel was engaged in towing a heavy barge with a pile-driver located thereon from said Point Reyes, or thereabouts, to the City and County of San Francisco, State of California, and as a means of towing said barge said defendant used a tow-rope and bridle which was rotten, unsound and defective, and its rotten, unsound and defective condition was unknown to plaintiff, but was known, or could have been discovered or known to defendant herein by the exercise of ordinary care or *negligence.*

VIII.

On said 8th day of June, 1923, while plaintiff was situate on said boat, ship or vessel, and while said defendant was engaged in towing said barge, as aforesaid, said tow-rope and bridle, by reason of its rotten, unsound and defective condition, broke and violently struck said plaintiff, causing plaintiff then and there to sustain severe personal injuries.

IX.

Said injuries then and there inflicted upon plaintiff consisted of the following, to wit: Concussion of the brain; one of the cervical vertebrae of his nick was dislocated; severe abrasions of the head, neck, chest, body, arms and shoulders; he was rendered sick, sore and disabled and suffered a severe nervous shock. Said injuries to the brain and neck are permanent in their nature and have totally incapacitated plaintiff from ever again working at his trade.

X.

At the time of receiving said injuries and for a long time prior thereto, plaintiff was, and had been, a strong, healthy, vigorous man and was earning wages in the sum of Sixty ($60) Dollars per week. [21]

XI.

By reason of his injuries plaintiff herein was confined to his bed for approximately three weeks, and has ever since said time been compelled to wear a leather Thomas collar about his neck, and has lost wages which he otherwise would have earned in the sum of Sixty ($60.00) Dollars per week from said 8th day of June, 1923, to the date hereof, aggregating Nine Hundred Sixty ($960) Dollars.

XII.

By reason of the premises plaintiff has sustained damages in the sum of Fifty Thousand Nine Hundred Sixty ($50,960) Dollars, no part of which has been paid by defendant.

WHEREFORE, plaintiff herein prays judgment against said defendant in the sum of Fifty Thousand Nine Hundred Sixty ($50,960) Dollars, and costs of suit.

JOSEPH J. McSHANE and
HEIDELBERG & MURASKY,
Attorneys for Plaintiff Herein. [22]

EXHIBIT "B."

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. ——.

Dept. No. ——.

JOHN SAUDER,

Plaintiff,

vs.

A. PALADINI, INC., a Corporation,

Defendant.

COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES.

Plaintiff complains of defendant and for cause of action alleges:

I.

Defendant herein is now, and was, at all times mentioned in this complaint, a corporation organized and existing under and by virtue of the laws of the State of California, doing business in said state and having its principal place of business in

the City and County of San Francisco, State of California.

II.

Said defendant is now, and was, at all times herein mentioned, engaged in the business of the wholesaling and catching of fish, and owned and operated boats, ships or vessels, and in particular owned and operated a boat, vessel or ship known as "Three Sisters" and was owner of certain wharves in the State of California, and particularly a wharf located at, or near, Point Reyes in the State of California. [23]

III.

Healy-Tibbitts Construction Company is now, and was, at all times herein mentioned, a corporation organized and existing under and pursuant to the laws of the State of California and having its principal place of business in the City and County of San Francisco, State of California.

IV.

The business of said Healy-Tibbitts Construction Company, among other things, was that of constructing wharves, and as such constructed under contract said wharf at, or near, Point Reyes, California, for said defendant.

V.

Plaintiff herein was, on the 8th day of June, 1923, and for a long time prior thereto had been, in the employ of said Healy-Tibbitts Construction Company as a pile-driver, and was engaged as such employee of said Healy-Tibbitts Construction Com-

pany in the construction of said wharf owned by defendant.

VI.

Plaintiff herein, on said 8th day of June, 1923, and for a long time prior thereto, resided in the City and County of San Francisco, State of California, and as a part of the contract existing between said Healy-Tibbitts Construction Company and said defendant for the construction of said wharf, defendant herein agreed with said Healy-Tibbitts Construction Company to transport said plaintiff to and from said City and County of San Francisco to Point Reyes and the wharf located thereabouts.

VII.

On the 8th day of June, 1923, plaintiff herein was a passenger as aforesaid on one of the boats, ships or vessels [24] owned and operated by said defendant, to wit: "Three Sisters," and while said plaintiff was a passenger on said boat, ship or vessel, as aforesaid and was being transported by defendant from said wharf to said City and County of San Francisco, said boat, ship or vessel was engaged in towing a heavy barge with a *pike*-driver located thereon from said Point Reyes, or thereabouts, to the City and County of San Francisco, State of California, and as a means of towing said barge said defendant used a tow-rope and bridle which was rotten, unsound and defective, and its rotten, unsound and defective condition was unknown to plaintiff, but was known or could have

been discovered or known to defendant herein by the exercise of ordinary care or negligence.

VIII.

On said 8th day of June, 1923, while plaintiff was situate on said boat, ship or vessel, and while said defendant was engaged in towing said barge, as aforesaid, said tow-rope and bridle, by reason of its rotten, unsound and defective condition, broke and violently struck said plaintiff, causing plaintiff then and there to sustain severe personal injuries.

IX.

Said injuries then and there inflicted upon plaintiff consisted of the following, to wit: fractured skull and concussion of the brain, causing partial paralysis of his right side and arm; severe abrasions of the head, neck, chest, body, arms and shoulders and he was rendered sick, sore and disabled, and suffered a severe nervous shock, and will continue to suffer great physical pain and mental anguish. Said injuries are permanent in their nature and [25] have totally incapacitated plaintiff from ever again working at his trade of pile-driving, and his memory has been seriously impaired.

X.

At the time of receiving said injuries and for a long time prior thereto, plaintiff was, and had been, a strong, healthy, vigorous man and was earning wages in *the of* Fifty ($50) Dollars per week.

XI.

By reason of said injuries plaintiff was confined to his bed for two months and has lost wages which

he otherwise would have earned in the sum of Fifty ($50) Dollars per week from said 8th day of June, 1923, to date hereof, aggregating Eight Hundred ($800) Dollars.

XII.

By reason of the premises plaintiff has sustained damages in the sum of Fifty Thousand Eight Hundred ($50,800) Dollars, no part of which has been paid by defendant.

WHEREFORE, plaintiff herein prays judgment against said defendant in the sum of Fifty Thousand Eight Hundred ($50,800) Dollars, and costs of suit.

JOSEPH J. McSHANE and
HEIDELBERG & MURASKY,
Attorneys for Plaintiff Herein. [26]

Receipt of a copy of the within answer to libel and petition is hereby admitted this 28th day of March, 1924.

IRA S. LILLICK,
HOEFLER, COOK & LINGENFELTER,
Attorneys for Petitioner.

[Endorsed]: Filed Mar. 28, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [27]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Third Division.

IN ADMIRALTY.—No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

STIPULATION AND ORDER ALLOWING FILING OF CLAIM AND ANSWER OF AETNA LIFE INSURANCE COMPANY.

IT IS HEREBY STIPULATED AND AGREED by A. Paladini, Inc., the petitioner herein, and William Carlson and John Sauder, claimants herein, by their respective proctors, that Aetna Life Insurance Company, a corporation, may intervene and file its claims and answers in the above-entitled proceedings with the Clerk of this court, and with the Commissioner heretofore appointed by said Court herein.

Dated: May 23, 1924.

IRA S. LILLICK,
HOEFLER, COOK & LINGENFELTER,
Proctors for Petitioner A. Paladini, Inc.

JOS. McSHANE,
HEIDELBERG & MURASKY,
Proctors for William Carlson and John Sauder, Claimants.

It is so ordered.

May 29, 1924.

PARTRIDGE,
District Judge.

[Endorsed]: Filed May 29, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Third Division.

IN ADMIRALTY—No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

ANSWER OF AETNA LIFE INSURANCE COMPANY TO LIBEL AND PETITION.

To the Honorable, the Judge of the Above-entitled Court:

Now comes Aetna Life Insurance Company, a corporation, and having filed with Francis Krull, Esq., the Commissioner appointed in the above proceeding by this Court, its joint claims in intervention with John Sauder and William Carlson, makes answer to the libel and petition for limitation of liability herein as follows:

I.

That said Aetna Life Insurance Company is a corporation organized and existing under and by

virtue of the laws of the State of Connecticut, and duly authorized and licensed to transact the business of workmen's compensation insurance in the State of California and to issue policies of workmen's compensation insurance pursuant to the Workmen's Compensation Insurance and Safety Act of 1917 of the State of California.

II.

Alleges that on the 8th day of June, 1923, John Sauder and William Carlson were, and for a long time prior thereto had been, in the employ of Healy-Tibbitts Construction Company, a corporation [29] organized and existing under and pursuant to the laws of the State of California, and engaged in the business, among other things, of constructing wharves, and as such was constructing under contract a wharf located at or near Point Reyes, California, for the petitioner herein; and said John Sauder and said William Carlson were engaged as such employees of said Healy-Tibbitts Construction Company in the construction of said wharf owned by said petitioner.

III.

Alleges that said John Sauder and William Carlson on the 8th day of June, 1923, and for a long time prior thereto, resided in the City and County of San Francisco, State of California, and as a part of the contract existing between said Healy-Tibbitts Construction Company and said petitioner for the construction of said wharf, the petitioner herein agreed with said Healy-Tibbitts Construction Company to transport said John Sauder and Will-

iam Carlson to and from said City and County of San Francisco to Point Reyes, and the wharf located thereabouts.

IV.

Alleges that on the 8th day of June, 1923, said John Sauder and said William Carlson were passengers, as aforesaid, on one of the boats, ships or vessels owned and operated by said petitioner, to wit, "Three Sisters," and while said John Sauder and said William Carlson were passengers on said boat, ship or vessel, as aforesaid, and were being transported from said wharf to said City and County of San Francisco, said ship, boat or vessel was engaged in towing a heavy barge with a pile-driver located thereon from said Point Reyes to the City and County of San Francisco, State of California. As a means of towing said barge said petitioner used a tow-rope and bridle which was rotten, unsound and defective, and its rotten, unsound and defective condition was unknown to said John Sauder or said William Carlson or to this claimant, but was known, or could have been discovered or known to the petitioner herein by the exercise of ordinary care and diligence. [30]

V.

Alleges that on said 8th day of June, 1923, while said John Sauder and said William Carlson were situate on said boat, ship or vessel, and while said petitioner was engaged in towing said barge, as aforesaid, tow-rope and bridle, by reason of its rotten, unsound and defective condition, broke and violently struck said John Sauder and said William

Carlson, causing them then and there to sustain severe personal injuries.

VI.

Alleges that at the time of the accident and injuries, as aforesaid, the said John Sauder and the said William Carlson were regularly employed by the said Healy Tibbitts Construction Company under contracts of hire, and at the time of said accident were acting in the regular course of their duties, and in the usual course of the business of said employer, and were performing services incident to their said employment, and were acting within the course of their employment, and that said accident and injuries arose out of and in the course of said employment, and were proximately caused thereby, and at the same time the said employer and the said John Sauder and the said William Carlson were subject to the provisions of the Workmen's Compensation Insurance and Safety Act of 1917.

VII.

Alleges that the said John Sauder and the said William Carlson pursuant to the said Workmen's Compensation Insurance and Safety Act of 1917 of the State of California, made legal claims against their employer for compensation and medical and surgical treatment, medicines and appliances required to be furnished to injured employees under the provisions of said Act.

VIII.

Alleges that at the time of the aforesaid accident and injuries the said Aetna Life Insurance Company insured the said Healy Tibbits Construction Com-

pany against liability for compensation [31] and for medical and surgical treatment, medicines and appliances under the aforesaid Act, and as such insurance carrier assumed the liability of said employer to pay the compensation for which the said employer was liable and complied with all the conditions of the Workmen's Compensation Insurance and Safety Act of 1917, and thereby became subrogated to all rights and duties of such employer and entitled to enforce such rights in its own name.

IX.

Alleges that by reason of the injuries so sustained by said John Sauder and said William Carlson on account of the carelessness and negligence of the petitioner, the said Aetna Life Insurance Company has necessarily expended up to the present time large sums of money for hospital services, nursing services, services of physicians and surgeons, for X-rays and for drugs furnished to said persons, all of which sums were reasonable expenditures therefor; that said Aetna Life Insurance Company is paying, and is liable to pay, further medical expenses, the amount of which cannot be determined at this time.

X.

Alleges that said Aetna Life Insurance Company, pursuant to said policies of workmen's compensation insurance and the said liability imposed by the said Workmen's Compensation Insurance and Safety Act of 1917, has paid said John Sauder and said William Carlson as compensation for disability from the date of said accident to the present time large

sums of money, and is still paying and liable to pay further compensation for the disability of said persons.

XI.

Alleges that pursuant to Section 26 of said Workmen's Compensation Insurance and Safety Act of 1917 of the State of California, claimant Aetna Life Insurance Company, a corporation, joins [32] in the above-entitled limitation proceeding as party claimant with claimant John Sauder and claimant William Carlson therein.

XII.

That by reason of the premises the said John Sauder and the said William Carlson have been damaged in large amounts, to the extent of a large proportion of which amount said Aetna Life Insurance Company has been and is damaged to date, and will be damaged to the extent of such further amounts as it is liable for to said John Sauder and said William Carlson for further compensation and medical expenditures; that said damages are the direct and proximate result of the carelessness and negligence of said petitioner, as herein alleged, and that no part of said damage has been paid, and the whole thereof is now due and owing from the petitioner to said John Sauder and said William Carlson respectively, and to said Aetna Life Insurance Company, and is wholly unpaid.

XIII.

Answering Article II of said libel and petition, denies that at the time of leaving Point Reyes the motorship "Three Sisters" was in all or any re-

spects properly manned or equipped, or was in all or any respects staunch or seaworthy.

XIV.

Answering Article III of said libel and petition, denies that said motorship on the alleged voyage encountered any long or ground swells, or that said motorship at said time proceeded during said voyage at half speed; admits that a tow-rope or bridle being used by said motorship as part of her apparel or equipment parted, and alleges that at said time said bridle and said tow-rope were in an unsound, rotten and defective condition; denies that said bridle or tow-rope parted or broke by reason of the alleged or any ground swells or otherwise than because of the unsound, rotten and defective condition of said tow-rope and said bridle, [33] and alleges that said tow-rope and bridle parted and broke because of said condition and by reason of being subjected to too great a strain for said bridle and tow-rope to bear in their said condition.

Denies that petitioner at the time alleged maintained a regular or other transportation service for persons by the motorship "Corona," and denies that said service was maintained for the accommodation of employees of Healy Tibbitts Construction Company, and denies that said "Three Sisters" was not used in said service.

Denies that said John Sauder or said William Carlson refused to await passage on the "Corona"; alleges that said Carlson and said Sauder were on said "Three Sisters" at the invitation and request

of the captain and master thereof, and as passengers thereon.

Denies that said Carlson or said Sauder signaled the master or captain of said "Three Sisters" that they desired to come aboard said vessel, or that her master on that account brought said vessel alongside of any barge; alleges, on the contrary, that said master or captain of said "Three Sisters" waited at Point Reyes for a period of about twenty-four hours for the purpose of having said Carlson and said Sauder come aboard said "Three Sisters" for the purpose of being transported as passengers thereon from Point Reyes to San Francisco at the invitation, request and demand of the master or captain of said vessel.

Denies that anyone at any time warned said Carlson or said Sauder to stay away from the stern of said vessel or from the tow-line which was attached to her mast.

Denies that said Carlson or said Sauder knew or could or should have known that the place upon said vessel at which they were stationed when said bridle or tow-line broke was at any time a place of danger to life or limb, or dangerous for anyone to remain in while said vessel was engaged in towing said barge; denies that in going to or in remaining at said place said Carlson or said Sauder failed to exercise ordinary care. Alleges that it was impracticable for them to occupy any other place on said "Three Sisters"; [34] denies that said Carlson and said Sauder failed to exercise ordinary care for their own safety or to conduct themselves as men of or-

dinary prudence would have done under the same circumstances; denies that a man or men or ordinary prudence would have remained away from said place under the same circumstances, or could or would have escaped injury from the breaking of said tow-line or bridle; alleges that said Carlson and said Sauder occupied and were upon the stern or after part of said "Three Sisters" under the direction of the master of said vessel.

XV.

Answering Article IV of said libel and petition, denies that the injuries suffered by said Carlson and said Sauder, or either of them, were not caused by fault on the part of said "Three Sisters," her master, officers and crew; denies that said injuries were occasioned solely or at all by any negligence on the part of said Carlson or said Sauder; denies that said Sauder or said Carlson were warned by the master of said vessel to keep away from the stern; denies that as prudent men they, or either of them, should have kept away from the stern, and alleges that they were on the stern part of said vessel under the direction of her master.

XVI.

Answering Article V of said libel and petition, denies that said accident happened or that the loss or damage alleged were done, occasioned or incurred without fault on the part of petitioner or without its privity and knowledge.

XVII.

Answering Article VI of said libel and petition, denies that the value of said motorship at the close

of said voyage did not exceed the sum of $10,000; alleges that this claimant has no information or belief sufficient to enable it to answer concerning the freight pending at the close of said voyage, or the allegation [35] that the claims mentioned in said Article VI exceed the value of petitioner's interest in said vessel and her freight pending, and placing its denial upon that ground denies each and every one of said allegations in said Article VI and demands strict proof thereof.

XVIII.

Answering Article VII of said libel and petition, alleges that this claimant has no information or belief sufficient to enable it to answer concerning the allegations in said Article VIII, and placing its denial upon that ground denies each and every one of said allegations in said Article VII and demands strict proof thereof.

XIX.

Answering Article VIII of said libel and petition, alleges that this claimant has no information or belief sufficient to enable it to answer concerning the allegations in said Article VIII, and placing its denial upon that ground denies each and every one of said allegations in said Article VIII and demands strict proof thereof.

WHEREFORE said Aetna Life Insurance Company prays that this Honorable Court will be pleased to enter its decree adjudging that said petitioner, as well as said motorship "Three Sisters," her engines, boilers, boats, tackle, apparel, furniture and equipment, and her freight pending on the ter-

mination of her aforesaid voyage, together with all stipulations and stipulators substituted for said vessel and said freight pending, are liable for the claims of said Aetna Life Insurance Company filed in this proceeding with the Commissioner therein appointed by this Court, and decreeing payment thereof and that petitioner is not entitled to any limitation of liability and cannot limit its liability in [36] any manner whatsoever, and that said Aetna Life Insurance Company recover said claims, interest thereon, and its costs incurred herein, and for such other and further relief as may be meet and just in the premises.

REDMAN & ALEXANDER,
BELL & SIMMONS,
Proctors for Claimant Aetna Life Insurance Company.

State of California,
City of San Francisco,—ss.

J. R. Molony, being first duly sworn, deposes and says: That he is the manager of Aetna Life Insurance Company, a corporation, and as such is authorized to verify the foregoing answer on its behalf; that he has read the said answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

J. R. MOLONY,

Subscribed and sworn to before me this 26th day of May, A. D. 1924.

[Seal] JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 27, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [37]

In the District Court of the United States of America, in and for the Northern District of California, Third Division,

IN ADMIRALTY—No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "Three Sisters" for Limitation of Liability.

(DEPOSITION OF JOHN TRUE URQUHART.)

Direct Examination.

(By Mr. HEIDELBERG.)

Q. What is your name?

A. John True Urquhart.

Q. Where do you reside?

A. 133–37th St., Manhattan Beach.

Q. You are at present employed in Manhattan Beach at what?

A. Construction work, pile and bridge work.

Q. How long have you followed the occupation of pile-driving?

(Deposition of John True Urquhart.)

A. About fifteen years, not steadily.

Q. On June 8th, 1923, Mr. Urquhart, where were you?

A. I was coming home from Point Reyes to San Francisco. Drakes Bay is what it really is.

Q. For whom had you been employed at Point Reyes?

A. Healy Tibbitts Construction Company.

Q. With whom were you working at Point Reyes at that time?

A. William Carlson was foreman, Owen Haney was engineer and John Sauder, Scotty Evans and George Reed and others I just can't remember.

Q. Those were some of the men with whom you were employed? A. Yes. [38]

Q. How long had you been employed at Point Reys before you left there on June 8th, 1923,?

A. Approximately one month.

Q. What boat did you take from San Francisco to Point Reyes the first time you were taken up there? A. The first time, the "Corona."

Q. Did you go up with William Carlson and John Sauder? A. Yes.

Q. Was there a barge taken up to Point Reyes at or about the same time your men went up there?

A. The pile-driver.

Q. Do you know what boat it was that towed the pile-driver to Point Reyes?

A. The "Three Sisters."

Q. Did you come back and forth to Point Reyes during the time you were employed there?

(Deposition of John True Urquhart.)

A. No.

Q. You remained there all that time?

A. Yes, I remained there all the time the job was going on.

Q. You do know, however, that the other men went back and forth on week-ends to San Francisco? A. Yes.

Q. Can you tell us on what boat the men would be taken back and forth from San Francisco and Point Reyes?

A. They went on the "Corona" once or twice and the "Three Sisters" on one or two occasions.

Q. You wouldn't care to say, would you, Mr. Urquhart, how many time the men went back and forth on the "Three Sisters" or back or forth on the "Corona"?

A. No. They went three or four times, possibly twice on each boat. Whatever boat happened to be there would take them down. [39]

Q. What day of the week, Mr. Urquhart, was it that you left Point Reyes at the completion of your work there to come to San Francisco, if you remember?

A. About the last of the week, on Friday, I think.

Q. How long before leaving Point Reyes had the "Three Sisters" been at anchor at Drakes Bay?

A. The night before or the afternoon before.

Q. Did you hear any conversation between Mr. Carlson and the captain of the "Three Sisters" when the "Three Sisters" arrived there prior to this Friday that you left? A. Yes.

(Deposition of John True Urquhart.)

Q. Who was present when that conversation took place?

A. All the crew was on the driver at that time. It is possible that anyone could hear it.

Q. At any event, you did hear a conversation between the captain of the "Three Sisters" and Mr. Carlson at that time and can you tell us, Mr. Urquhart, what that conversation was, to the best of your knowledge?

A. The captain asked Carlson when the job would be finished, as he was to stay and take the men and driver and all the equipment home when the job was finished.

Q. On this Friday that you left Point Reyes you, together with other members of your crew boarded the "Three Sisters" did you not? A. Yes.

Q. Did you, at any time, hear the captain tell any members of your crew that they were to come aboard the "Three Sisters"? A. No.

Q. Did he tell you any such thing?

A. No.

Q. Did you ever hear any conversation between the captain or any members of the crew or yourself on what part of the boat they were to remain? [40]

A. I did not.

Q. Did you ever hear the captain of the "Three Sisters" warn or caution anyone on board that boat that they were not to remain in the rear or stern of that boat? A. I did not.

(Deposition of John True Urquhart.)

Q, How many men were on this boat at the time you left Point Reyes, approximately?

A. Seven; nine men including the captain.

Q. Did not the members of your crew and yourself have any luggage to take back to San Francisco? A. We did.

Q. Do you remember on what part of the "Three Sisters" that luggage was stored?

A. On top of the house.

Q. Do you remember whether or not any of the luggage was stowed on the side of the boat?

A. No. The passageway on each side of the house was cleared and the luggage and equipment was stowed on top of the house.

Q. How much deck room, if you remember, was forward of the pilot-house?

A. Very little forward, possibly about eight feet.

Q. Did you hear the captain say anything about whether the men were to stay on the front of the boat? A. I did not.

Q. Did you notice anything on your return trip as to whether or not the waters broke over the bow of the boat?

A. After getting under way there was quite a swell on and she was taking water; the spray was flying over the bow and you couldn't stay there without getting soaked.

Q. Did you hear the captain say anything to any member of the crew as to whether or not they should go below and stay below on [41] the "Three Sisters?" A. No.

(Deposition of John True Urquhart.)

Q. Mr. Urquhart, did you notice the bridle which was attached to the tow-line and from the tow-line to the barge? A. I did.

Q. And the "Three Sisters" when it was transporting you and the other members of this crew from Point Reyes to San Francisco was engaged, was it not, in transporting or towing this barge that you spoke of? A. It was.

Q. How was that barge being towed?

A. By the wire bridle which was fastened to the two corner bits on the barge.

Q. And was the tow-rope attached to this bridle?

A. Yes, it was shackled into the bridle.

Q. Did you notice the condition, Mr. Urquhart, of this bridle that was being used? A. I did.

Q. Just tell us what you noticed about the condition of this bridle?

A. The wire was quite rusty as if it had been used for a long time or been lying around like it was old. The swivel in the center where the tow-line shackled into was not in good working order.

Q. What was wrong with the swivel?

A. It was rusted fast or frozen so that it would not turn.

Q. Have you had any experience in the use of ropes and bridles during your occupation as a pile-driver?

A. I have been ship rigger and certainly made lots of bridles and lots of wire in my time.

Q. From your observations, Mr. Urquhart, was

(Deposition of John True Urquhart.)

or was not this [42] bridle a fit and proper bridle to be used in the condition that it was?

A. It was not to my idea.

Q. What effect, if any, Mr. Urquhart, was the fact that the swivel in the bridle being frozen or rusted have upon the likelihood of this bridle to break when being used for towing?

A. When the tow-line becomes taut the turns will run out of the rope and the swivel being frozen and rusted solid the turns would have to go into the wire as there is no place else for them to go; so the wire would lay up one part on the other like a rope.

Q. And would that condition have a tendency to cause the bridle to snap or break?

A. It certainly would, chafing up like that, the laying and unlaying would wear it out in a short time and weaken it so as to cause it to break.

Q. Did this bridle break when this barge was being towed on this voyage? A. Yes.

Q. Where were you when this happened?

A. I was in the galley.

Q. You did not see the accident at the very time it happened, did you? A. I did not.

Q. Did you subsequently come out of the galley?

A. George Reed called me and told me the tow-line was carried away and hit Carlson, and I run out.

Q. And then what did you see when you ran out?

A. I ran aft and saw Carlson and Sauder lying on deck both unconscious. [43]

(Deposition of John True Urquhart.)

Cross-examination.

(By Mr. LINGENFELTER.)

Q. When did you first observe the condition of the bridle upon the barge?

A. The first time when it was put on the barge to be towed to Point Reyes. The barge left Pier 46.

Q. Then the first time you observed the condition of this bridle was when you were aboard the barge at Pier 46 at the port of San Francisco before the barge was towed to Point Reyes where it was used in the pile-driving work in which you were engaged, was that true? A. That's right.

Q. And that was about one month you estimate, before the return voyage which occurred on the 8th day of June, 1923? A. It was.

Q. And you would say that at the first time that you examined this bridle that it was frozen in the swivel? A. It was.

Q. Rusted fast?

A. At the time we put it on at Pier 46 the two parts of the bridle spliced into the swivel was twisted up between two and three feet.

Q. Did I understand you to say that at the time you first observed this bridle at Pier 46 that the swivel of the bridle was so rusted and frozen that the swivel would not turn? A. Yes.

Q. That was the condition of the bridle at that time?

A. That was the condition of the bridle and before putting the eyes over the bit we took the

(Deposition of John True Urquhart.)

turns out of the wire so that both parts of the bridle was clear. [44]

Q. But the swivel at that time was frozen?

A. It was.

Q. Where the sides of the bridle spliced into the eyelets of the swivel, was the cable frozen to the eyelets? A. No.

Q. Was the entire bridle in a rusted condition on this occasion when you first observed it?

A. It was some rusted throughout.

Q. Did you observe any oil upon the bridle?

A. No.

Q. Did you observe any oil upon the swivel of the bridle? A. Not a bit.

Q. Did you ever again observe the bridle after this observation of it which you have just testified to?

A. I helped put the bridle on the barge to be towed from Point Reyes to San Francisco.

Q. You say the vessel was on the return voyage, I mean the voyage of June 8, 1923, taking water over the bow; you do not mean the bow of the vessel was actually taking the sea by the bow?

A. Well, the vessel headway on rises and falls and on that occasion there was quite a swell running and when she would dive into the swell the spray would fly over the forward part of the vessel.

Q. She was not, however, shipping any sea at that time, was she?

A. Not very heavy; occasionally a dip.

(Deposition of John True Urquhart.)

Q. You never actually saw any of the sea come aboard on that voyage, did you? A. Oh, yes.

Q. Do you mean that the sea broke over the bow to your observation on that voyage?

A. Yes, I would say not very heavy; she was not laboring very heavy. [45]

Q. As a matter of fact, it was only the spray that was coming over the bow, wasn't it?

A. Well, as I said before, she was not shipping in heavy seas, that is, I mean that would wash you off your feet or anything like that.

Q. What I am endeavoring to get at is whether or not the vessel was shipping any sea by the bow as distinguished from spray breaking over the bow. Do you understand what I am endeavoring to get at?

A. Yes, I do, and I am answering that an occasional dip was taken and the water would run aft alongside of the house.

Q. And was this the condition of the sea at the time the accident occurred, I mean the accident in which Mr. Carlson and Mr. Sauder was injured?

A. It was.

Q. And at about that time the sea was breaking over the bow to such an extent that men standing at or in front of the wheel-house would be drenched by the water? A. Yes.

Q. Was the sea such at the time of the accident that men standing opposite the engine-house would be drenched by the sea?

A. Yes, they would get an occasional spray.

(Deposition of John True Urquhart.)

Q. Was the sea such at the time of the accident that men standing opposite the mast would be drenched by the water coming aboard ship?

A. No; that was about the only dry place that there was on it; that is, on deck, the spray would come over the bow halfway along the house as she would dip in and roll it would slop into the rails.

Q. How long before the accident that this condition of the sea prevailed—by that I mean the condition whereas you have testified the sea was breaking over the bow? [46]

A. As soon as we got out of Point Reyes and out of the bay she began to take ship sprays.

Q. How long was the "Three Sisters" out of port of Point Reyes before the accident happened?

A. From the time we started to tow, at least an hour and a half.

Q. How long had you been in the galley of the "Three Sisters" before the accident happened?

A. About fifteen or twenty minutes; I had had something to eat.

Q. You shaved yourself at that time?

A. I did.

Q. During the time you were in the galley were any of your coworkers there; by that I mean the other employees of Healy-Tibbits Construction Company of the company in which you were engaged were with you in the galley? A. Yes.

Q. How many, and who?

A. The cook; I don't know his name.

Q. Anyone else?

(Deposition of John True Urquhart.)

A. Scotty Evans relieved the captain for a few minutes while the captain went in the engine-room; he took the wheel.

Q. Scotty Evans did not come into the galley, did he,—he went into the wheel-house?

A. He went into the wheel-house but he came through the same door of the galley. The galley is just aft of the wheel-house.

Q. Was the companion-way to the forecastle opened or closed on the voyage of June 8, 1923?

A. It was closed entirely; all deck hatches were closed.

Q. Did any of the men who had been employed by Healy-Tibbitts Construction Company and who were aboard the "Three Sisters" on the voyage of June 8, 1923, get below into the forecastle? [47]

A. No, not to my knowledge. Pardon, may I suggest—as going into the hold getting off the deck the captain said there were fumes of gasoline in the hold and he would not allow any smoking down there. He didn't want us to go into the hold on that account.

Q. All the captain said to you about going below is that he would not permit smoking there, was that true? A. Yes.

Q. Then he never gave any instruction to the men aboard not to go into the forecastle, did he?

A. Not to my knowledge.

Q. Was there anything stowed on the deck of the "Three Sisters" forward of the wheel-house on the voyage of June 8, 1923?

(Deposition of John True Urquhart.)

A. I am not positive, but I think there was two water-casks.

Q. Of what contents were these casks?

A. Oh, about 300 gallons each.

Q. About 300 gallons each? Were they made of wood or metal? A. Wood.

Q. And how high were they?

A. About four feet six inches.

Q. And it is your recollection that both of these water-casks were stowed in the bow ahead of the wheel-house; is that correct?

A. I know they had been there but I am not positive if they were there on the return voyage as all our water used on the job had been brought from San Francisco in like barrels.

Q. Then you do not know whether or not these two casks were aboard on the voyage upon which Carlson and Sauder were injured?

A. I couldn't swear it if they were on the launch or the driver; I know we had some on the driver.

Q. Then it would be your present recollection that the bow of the "Three Sisters" was clear upon the return voyage? [48]

A. I am not positive that the casks were there, otherwise the deck would be clear.

Q. Do you ever remember of seeing these two water-casks stowed aboard the "Three Sisters" ahead of the wheel-house on any voyage?

A. I do.

Q. But you are not certain whether or not they

(Deposition of John True Urquhart.)

were in that position on the voyage of June 8, 1923? A. I am not.

Q. There are two fuel tanks upon the top of the engine-house of the "Three Sisters" immediately aft of the galley, are there not?

A. I am not positive of their location.

Q. You took aboard on the return voyage certain bedding, camp equipment and supplies, did you not? A. I did.

Q. And all of said camp equipment, bedding and supplies, I understand you to say, was stowed on top of the engine-house? A. Yes.

Q. Did you take any stoves on the "Three Sisters" on this return voyage?

A. Yes; one cook stove.

JOHN TRUE URQUHART. [49]

State of California,
County of Los Angeles,—ss.

I, Annie B. Myers, a notary public in and for the city of Los Angeles, county of Los Angeles, State of California, do hereby certify that John True Urquhart, the witness in the foregoing deposition named was by me duly sworn, and that said deposition was then taken at the time and place mentioned in the enclosed stipulation, to wit, office, 528 Marsh-Strong Building, in the city of Los Angeles, county of Los Angeles, State of California, on the 29th day of March, 1924, between the hours of 3:00 P. M. of that day; that said deposition was taken in shorthand and thereafter transcribed

by Julia Born, a competent and disinterested person, by me duly appointed and sworn for said purpose, and when completed was by me carefully read to said witness, and being by him corrected, was by him subscribed in my presence.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my notarial seal at my office in the city of Los Angeles, County of Los Angeles, State of California, this 12th day of April, 1924.

[Notary's Seal] ANNIE B. MYERS,
Notary Public in and for the County of Los Angeles, State of California.
My commission expires Jan. 24, 1928.

[Endorsed]: Opened and filed August 12, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [49½]

In the Southern Division of the United States District Court in and for the Northern District of California, Third Division.

IN ADMIRALTY—No. 18,142.

Before Hon. JOHN S. PARTRIDGE, Judge.

VOLUME 1.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

(TESTIMONY TAKEN IN OPEN COURT.)
Tuesday, August 5, 1924.

Counsel Appearing:

For the Petitioner: IRA S. LILLICK, Esq., and Messrs. HOEFLER, COOK & LINGENFELTER.

For William Carlson and John Sauder, Answering Claimants: Messrs. HEIDELBERG & MURASKY, and JOSEPH J. McSHANE, Esq., and GOLDEN W. BELL, Esq.

REPORTER'S TRANSCRIPT. [50]

Mr. LILLICK.—May it please the Court: This is a matter in which A. Paladini, Inc., a corporation, is seeking to limit its liability for the appraised value of a gasoline motor-boat called the "Three Sisters." An appraisal has been had. The Commissioner has fixed her value at $15,918, for which a bond has been filed.

There are two issues that the Court will pass upon: 1. Whether we are entitled to limit our liability; and, 2, whether we are liable for the damages suffered by two men who were operating a pile-driver and who came back upon the "Three Sisters" from Point Reyes. Paladini, Inc., owned this gasoline motor-boat, the "Three Sisters," with three other gasoline motor-boats, which they operated at sea in bringing back the fish that were caught outside, and which at times were left at Point Reyes. The operation of the vessels was an

adjunct to their main business, the wholesaling and retailing of fish. In the course of their operations it became necessary, in their opinion, to build a pier at Point Reyes on Drake's Bay. A contract was entered into between them and the Healy-Tibbitts Construction Co., in which the Healy-Tibbitts Construction Co. were to drive the piers at this proposed site for the pier. The contract provided that a pile-driver belonging to the Healy-Tibbitts Construction Co. and put upon a barge known as barge 61 belong to the Crowley Launch & Towboat Co. was to be towed to and from Drake's Bay.

The COURT.—Towed by Paladini?

Mr. LILLICK.—Towed by Paladini. In that operation they used the "Three Sisters." The pile-driver was taken to Drake's Bay on the 10th of May, 1923. The work was expected to take about a month. The men who went up, workers for the Healy-Tibbitts Construction Co., and the equipment, stores, and [51] supplies, were to be taken up by the gasoline motor-boat "Corona," which during the 30 days called from day to day and took up stores and such necessary equipment as were needed to carry out the work at Drake's Bay.

At the completion of the work, in so far as the pile-driver was necessary, Healy-Tibbitts notified the main office that they were ready to return. Mr. Paladini, in charge of the main office, in turn notified his port engineer, who had charge of the vessels. In passing, I might say that the operation of these

four vessels, their equipment, such necessary repairs as had to be made upon them, and, in fact, the entire charge, custody and control of the vessels was under the particular supervision of the port engineer; the main office had nothing to do with that.

The port engineer, in turn, notified the captain of the "Three Sisters," which vessel had taken the pile-driver up, that he should go up to Drake's Bay and bring her back. He went up, and after waiting two days, because certain parts of the work apparently had not been completed, he started back with the pile-driver on the barge in tow. During the first portion of the back tow, the hawser between the "Three Sisters" and the barge, which was a 7-inch manila rope, and as to which I believe there will be no question as to its soundness, was attached to a bridle at the bow of the barge which had no rudder. That rope, when they first started, was approximately 50 feet long. When they got out into the commencement of the rough water, and just before they entered the rough water, at the buoy at Drake's Bay, the hawser was let out so that, as we believe, from 400 to 550 feet of the rope was let out. Certain of the equipment taken up by the men—their [52] beds, their bedding, other personal belongings of theirs—were put upon the "Three Sisters." When they started, the five men who came down with the boat and the tow, and who were employed by the Healy-Tibbitts Construction Co., started on the barge, but when the hawser was lengthened, just by the buoy, these men asked to

come on board the "Three Sisters." When they did so, the captain, who will be our first witness, told them not to stay at the stern, because of the danger of the hawser. Three of those men, after getting on board the "Three Sisters," went forward, and at the time of the accident were standing by the pilot-house, talking to Anderson, the deck-hand, and to Kruger, the captain. Two of the men were on the after end of the gasoline motor-boat, where they had been warned not to be, and under the hawser itself, practically, and were playing a game of cards.

The COURT.—Where was the capstan?

Mr. LILLICK.—The capstan, though they did not speak of it and will not speak of it as a capstan during the testimony, was a mast or a sampson post in the center forward portion of the after deck.

I think at this point it would be at least interesting to show something about the gasoline motor-boat. I have a chart here. This has been drawn to scale, as we will afterwards prove. In general form this is the vessel, the "Three Sisters." The capstan, about which your Honor asked, for it was substituted this center mast. The tow-line was attached to the center mast. In making the statement I have about the number of men, I have only spoken of five—there were more than five; there were perhaps eight or nine men, I mean employees of the Healy-Tibbitts Construction Co. Three of them were at the forward [53] portion of the house, on the fore deck, talking to Anderson, our deck-hand, and Kruger, the captain; the two men

who were injured were on the after deck, sitting below, or nearly below, the hawser, with two other men, playing a game of cards.

When they arrived at that portion of the entrance to the heavy water, the captain began to be concerned about the men, and warned them to move, but they paid no attention to him. Thereafter, one end of the bridle broke. Your Honor perhaps knows the manner in which a bridle is attached to a square-fronted barge; one end of the bridle is looped over a bitt or a post; the other end is looped over the other side, and then in the middle is a swivel with a hook, to which is attached the hawser. One side of this bridle broke; therefore, the other side broke —carried away—and the tautened line, suddenly giving away, whipped or in some way struck two of these men who were playing cards. It is the contention of the claimants that they were very badly injured. Suits were commenced in the State court. A petition for limitation was filed in this court and a temporary restraining order issued. The two men filed their claims in this proceeding. The suits commenced in the State court were for $50,000 each. The men having received compensation under the Workmen's Compensation Act of this State were paid that compensation by the Aetna Life Insurance Co., which in turn also appeared in the case. We are met this morning with the contention of the Aetna Life Insurance Co. and the two men that we have no right to limit our liability, and that in addition to that we were responsible for the injuries suffered by them.

The COURT.—The Aetna was the insurer of the Healy-Tibbitts Co.? [54]

Mr. LILLICK.—Yes, your Honor, the Aetna was the insurer of the Healy-Tibbitts Co. I had intended to ask your Honor, before I began this statement, for an order of default as to all others interested and not appearing this morning. As I say, I intended to ask for the order before I commenced my opening statement, and I ask for that order now.

The COURT.—Very well.

Mr. BELL.—If your Honor please, I would like to make a very brief statement with respect to the issues which are involved here under the pleadings. Mr. Heidelberg is representing the two men who were injured, and I appear on behalf of the Aetna Life Insurance Company by reason of Section 26 of the Compensation Act, giving a lien to the employer or the employer's insured permitting him to join the action. In making the statement, I make it on behalf of both Mr. Heidelberg and myself.

The libel of the petitioner, or, rather, the petition filed by the petitioner states that it is engaged in the business of owning and operating ships in the Pacific Ocean and its inlets in pursuit of said corporation's general business, to wit, that of fishing, and is and at all of said times was the owner of the motorship "Three Sisters," which said motorship is now lying in the port of San Francisco, and within the jurisdiction of this Honorable Court.

That on the 8th day of June, 1923, said motorship left the port of Point Reyes, in the State of California, on a voyage, having in tow a barge bound for the port of San Francisco, in the State of California, where said voyage was terminated on the 8th day of June, 1923.

I simply read that paragraph in order to call to your Honor's [55] attention the short length of the voyage.

Paragraph III of the petition alleges that while on said voyage, and while towing said barge, in the morning of the 8th day of June, 1923, and while out of said port of Point Reyes about one hour and thirty minutes, and off the Coast of California, said motorship and her tow encountered a succession of long ground swells. Upon entering said ground swells the master of said motorship caused her to proceed on said voyage under half speed. The master was at the wheel. Suddenly, while said motorship was on the receding side of one of said ground swells, and while going at half speed, as aforesaid, the one side of the bridle upon said barge was seen by the master of said motorship to part. The master immediately thereafter, and before any further breaking of said bridle, disconnected the engines of said motorship from her propeller shaft, but, while not under any power from said motorship, but while being carried forward by the force of said ground swells and of the sea, the other side of said bridle upon said barge parted, completely disconnecting said motorship from her tow, and

that the end of that line, both sides of it having broken, flew back and struck two of these men.

It is alleged in the same paragraph, at a later point, that on encountering the ground swells as aforesaid, the master of the motorship warned these two men and the other two men engaged with them in a game of cards, to stay away from the stern of the vessel and from the tow-line, but that they did not do so.

Then, it is alleged that on the parting of the bridle from the barge it whipped back and struck the men.

I call your Honor's attention also particularly to paragraph [56] IV, which says:

> "The said injuries to the said Carlson and the said Sauder were in nowise caused by fault on the part of said motorship 'Three Sisters,' her master, officers or crew, but were occasioned solely by reason of the negligence of said Carlson and said Sauder, in that they, the said Carlson and said Sauder, did not keep away from the stern of said motorship 'Three Sisters,' nor from said tow-line, as they were warned by the master of said motorship 'Three Sisters' to do, and as they, as prudent men, should have done."

I call your Honor's attention to the fact that the sole defense, or, rather, the sole ground upon which it is desired to limit liability, is that these men were injured through their own negligence, and not through the negligence of the vessel or of her crew.

And, of course, with respect to the matter of privity, that the vessel was seaworthy, and whatever

fault may have existed, the Paladini Company was privy to it. However, there is no such defense as a peril of the sea, or anything of that sort.

So that we have here the fact that the accident occurred. There is no explanation of why the bridle broke. It simply broke. There is no allegation that there was any extraordinary weather, extraordinary sea, or anything of that kind.

I am now going to take the liberty of reading to your Honor just a paragraph or two which I think will tend to keep the issues clear in all of our minds, from an opinion by Judge Hand in the case of the S.S. "Hewitt," 284 Fed. 911. That was a case in which the petitioner was the owner of the steamer "Hewitt." They sought to limit liability. The respondent, [57] upon filing its claim and answer, attached a number of interrogatories to its answer, whose purpose was to answer whether or not the vessel was seaworthy or overloaded at the time of clearing from the port of Sabine, Texas, and whether her unseaworthiness was known to the petitioner. The exceptions were filed on the theory that the interrogatories pry into the petitioner's case.

Judge Hand said: "It is settled that interrogatories must be confined to evidence in support of the case of the side presenting them, and this is as true after the new admiralty rules as before. Therefore the question at bar turns upon whether or not the allegations of unseaworthiness and overloading in the respondents' answer are true defenses to the petition. This calls for some formal analysis of

proceedings for the limitation of a shipowner's liability under Revised Statutes, Secs. 4283–4285, and the fifty-first admiralty rule (267 Fed. xix).

"2. Such proceedings are theoretically in two distinct and successive parts, and, while for convenience the pleadings are in part consolidated, they are usually tried together, though that need not be done. It is of consequence to clearness of understanding that they should be kept apart in the minds of pleaders. The first step is to determine whether the owner is entitled to limit his liability at all; the second presupposes his success in the first, and determines how far he is liable to respond to the claimant to the extent of what he surrenders. On the first he has the burden of proving all the necessary allegations; on the second the claimant has it. All the owner need show is that he is an owner, that he or his ship has been sued for some 'act, matter or thing, loss, damage or forfeiture,' [58] and that his loss, if any, was 'done, occasioned or incurred without the privity or knowledge' of himself. When he does this, his right to limit is established, and this stage of the proceedings theoretically ends. The rest is merely to ascertain the proper distribution of what he has brought into court and surrendered.

"Preliminary even to this is the determination as to whether he has fulfilled the condition of his right by surrendering the vessel and her pending freight or by giving a stipulation of proper value. With that these exceptions are not concerned. Now, in undertaking to prove that the loss did not occur

with his privity, the owner must necessarily show either just how the loss did occur, or, if he cannot, he must exhaust all the possibilities, and show that as to each he was without privity. This, to be sure, he need not always do by going over the possibilities, item by item. No doubt it might be enough to show that to his knowledge the ship was well found, properly manned, and staunch, tight, and adequately equipped. I do not mean to suggest any necessary form of evidence. The relevant point is that he undertakes to prove that, whatever the cause of loss, he was ignorant of it; that burden he undertakes, with all the possibilities which it may involve.

> "The respondent—not at this stage a claimant at all—has no burden of proof. All he need do is to break down the case made by the petitioner and he wins; the petition is dismissed, and he may sue the petitioner as and where he chooses."

In other words, the pleading on the part of the respondent in such proceeding is to some extent formal. Under the Supreme Court admiralty rules, before a party is entitled to answer a petition for limitation of liability, he must file [59] his claim before the commissioner. All he does is to file the claim before the commissioner. That is spoken of as proving his claim. That is a condition precedent to answering. When he does answer there are two distinct issues; the first is as regards privity or knowledge of the owner as to what caused the loss, whatever it is to be attributed to. In connection

with that burden on the part of the owner, I call your Honor's attention to a case in 251 Fed. 214, the case of In re Reichert Towing Line, 251 Fed. 214:

> "However, even in tort cases, where there is no contractual liability, one relying upon inevitable accident as a defense must either point out the precise cause, and show that he is in no way negligent in connection with it, or he must show all possible causes, and that he is not in fault in connection with any one of them. The presumption of fault the Reichert Company has not overcome, and therefore it must be held liable for negligence in the limitation proceeding, and liable primarily because of the unseaworthiness of its tug in the subsequent suit brought by the owner of the 'Mathilde R.'"

So we contend here that on the pleadings—so far as the breaking of the bridle is concerned—a *prima facie* case has been established at the outset because there is no accounting for or an attempt to account for the breaking of the bridle. Therefore, it would seem that the only issue left in the case is whether or not these men were solely, themselves, the cause of their own injuries through their own negligence.

Mr. LILLICK.—Your Honor, I am somewhat at a loss to comprehend the point Mr. Bell has been seeking to cover. It would seem to me that he has said that because we have not used the phrase "perils of the sea" we are foreclosed from proving how [60] the accident happened and what occurred.

The COURT.—No, I don't think that, Mr. Lillick. I could not agree with that. I think you had better go ahead with your evidence.

Mr. LILLICK.—It was only for the purpose of having a statement from Mr. Bell as to whether he claims that the allegation of this petition, reading from page 2:

> "But while not under any power from said motorship, but while being carried forward by the force of said ground swells and of the sea, the other side of said bridle upon said barge parted"—

is not a statement that because the disconnected engine of the motorship left her on the sliding edge of a ground swell, forcing her one way, and that the barge at the other end of the hawser upon a receding swell taking her the other way, and by the force of the sea parting the line. However, I think we need not take up any time in that type of discussion here, because the testimony certainly will be admissible and it will be for the Court to decide.

Mr. BELL.—My point is that there is no allegation of any extraordinary weather, or any peril of the sea, or any extraordinary sea, or anything of that kind.

Mr. LILLICK.—That was the part of it that was giving me concern, your Honor—the statement, now repeated by Mr. Bell, that we made no allegation that the loss was due to a peril of the sea. We did not call it a peril of the sea, but it was a loss that could only come from a venture that was involved in a peril of the sea.

The COURT.—Mr. Bell's point was, I think, that the allegations of the petition practically amount to an occurrence that ordinarily might be expected at sea, and, therefore, not a peril [61] of the sea.

Mr. LILLICK.—If that be Mr. Bell's point—I want to feel I am not going forward with any misapprehension as to what I might meet hereafter as to our pleading not being a sound pleading, your Honor.

The COURT.—Well, Mr. Lillick, you can put in your proof, and if you need to amend you can do so.

Mr. LILLICK.—That is what I had in mind, your Honor. I will call Captain Kruger. [62]

TESTIMONY OF CHARLES KRUGER, FOR PETITIONER.

CHARLES KRUGER, called for the petitioner, sworn.

Mr. LILLICK.—Q. What is your age?

A. 31.

Q. What is your occupation?

A. Launch operator.

Q. How long have you been a launch captain?

A. Since 1917.

Q. Prior to 1917, what was your occupation?

A. Launch operator since 1917.

Q. Before that, what did you do?

A. I was on yachts.

Q. In what capacity?

A. Some small boats and some large boats.

Q. Whereabouts? A. Sausalito.

Q. How long were you at Sausalito?

(Testimony of Charles Kruger.)

A. I have been there since 1902.

Q. From 1902, do you mean that you were there on small boats and on yachts?

A. No, sir, not all the time.

Q. For how many years were you on the water?

A. Practically since I was fourteen years old I have been on the water.

Q. What papers, if any, do you hold?

A. Launch operator's license.

Q. When was that given you?

A. I got them in 1917.

Q. Where are you now employed?

A. Down at San Pedro.

Q. With whom?

A. I am working for myself down there now.

Q. When did you commence work for Paladini?

A. In 1922, I think.

Q. In what? A. In 1922.

Q. In what position?

A. As launch operator.

Q. Who employed you? A. Alec Paladini.

Q. Who actually hired you, who actually told you to go to work?

A. I went down and saw the port engineer and he took me up to Alec Paladini.

Q. Who was that port engineer?

A. Mr. Carlton.

Q. When you went to work for Paladini, on what boat did you [63] first work?

A. On the "Three Sisters."

Q. From the time you first went to work until

(Testimony of Charles Kruger.)

the time of this accident, upon what vessel were you employed? A. On the "Three Sisters."

Q. So that continuously you were on her as her captain, were you? A. Yes, sir.

Q. What crew did you have on the "Three Sisters," that is, how many men?

A. There were always two men on board all the time.

Q. What do you mean by two men on board: Do you mean two men besides yourself, or you and one man? A. Me and one man.

Q. What were your duties on the boat?

A. I was master of the boat, and looked after the engines also.

Q. How big is the "Three Sisters," what are her dimensions?

A. She is 58 feet long, about 18 feet beam, I believe; I could not tell exactly.

Q. I call your attention to the tracing on the blackboard and ask you whether that is a correct diagram of the "Three Sisters"? A. Yes, sir.

Q. Prior to working on the "Three Sisters," what other vessels were you on as master?

A. I have been on the F. E. Booth & Co's. boats.

Q. Give us the names of those boats.

A. "Tano," "Junta," "California," and various other small boats.

Q. How did these gas boats of Booth & Co. compare in size with the "Three Sisters"?

A. They are pretty nearly practically the same size, except that one of them is larger, the "Junta."

(Testimony of Charles Kruger.)

Q. Where did they operate when you were operating them? A. Out of San Francisco, fishing.

Q. Where did they go?

A. Out to the Farallones, sometimes, sometimes to Point Reyes. [64]

Q. How many times a week would you go out on those boats?

A. Every day except Saturday.

Q. What acquaintance have you with the waters about Drake's Bay, up near Point Reyes?

A. I have been going in and out of there quite a bit.

Q. "Quite a bit" doesn't mean anything; how many times a week, or how many times a year, approximately?

A. I might say about five days a week we came in and out of there.

Q. Over what period of time have you been going in and out of Drake's Bay?

A. Sometimes we leave at two o'clock in the morning, sometimes at three, according to where we are fishing.

Q. Over what period of years?

A. In the fall of the year most of the time, and also in the summer when we are carrying salmon.

Q. What year did you first go into Drake's Bay —was it 1915, 1916, or 1917, or what year was it?

A. It was 1917.

Q. Have you ever made any tows of other vessels to Drake's Bay prior to the tow on which these two men were injured?

(Testimony of Charles Kruger.)

A. I towed barges there every year, about twice, going out and coming in from San Francisco to Point Reyes, and from Point Reyes to Bodega.

Q. What kind of a barge?

A. The barge they use in the salmon season.

Q. What are the dimensions of the barge, how big was the barge?

A. I could not tell you how big they were, but they were pretty good sized barges.

Q. Do you remember approximately how large the barge was that you towed the pile-driver up on?

A. I couldn't tell you how big she was.

Q. How did she compare in size with the fishing or salmon barges you towed?

A. She was smaller. [65]

Q. In towing the salmon barges, what size hawser did you usually have?

A. From 6 to 7 inch hawser.

Q. Do you remember the approximate size of the hawser with which you towed the pile-driver up to Drake's Bay?

A. A seven-inch hawser.

Q. Do you remember the size of the hawser with which you started to tow her back?

A. The same hawser.

Q. Was that hawser larger or smaller than the hawser you had used in towing the salmon barges?

A. Larger.

Q. With the salmon barges, have they the square front that the barge on which the pile-driver was had? A. Yes.

(Testimony of Charles Kruger.)

Q. Were the salmon barges without a rudder?

A. Some of them had a skag rudder, and some of them didn't have a skag.

Q. Did you or did you not use a bridle with the salmon barges in towing them? A. Yes.

Q. In doing that work that you performed with the "Three Sisters," from whom did you receive your orders? A. From the port engineer.

Q. Who was the port engineer at the time you started up with the pile-driver?

A. Mr. Carlton.

Q. Who was the port engineer at Paladini's when you started back with the pile-driver?

A. Mr. Davis.

Q. How long had Mr. Carlton been working as port engineer prior to his leaving, if you know? Was it during all the time that you were there?

A. Yes.

Q. During all of that time that you worked for Paladini, from whom did you receive your instructions? A. From the port engineer.

Q. What contract, if any, did you have with the main office at which Mr. Alec Paladini was?

A. I always got my orders through the port engineer; we always got our orders from him. [66]

Q. Did you have anything to do with the main office? A. No, sir.

Q. In covering whatever repairs the "Three Sisters" needed during the time you were operating her, to whom did you go for the new equipment?

A. The port engineer.

(Testimony of Charles Kruger.)

Q. Who made inspections upon your vsesel?

A. The port engineer.

Q. Did you have anything to do personally with the choosing of the hawser that you used on this occasion? A. No, sir.

Q. Where did you get it?

A. I got it from the port engineer.

Q. On the trip up, when you took the pile-driver up, what did you do about getting the hawser? Tell us how you got it aboard your boat.

A. We got it aboard from the wharf. The port engineer had it down on the wharf, and we put it on the boat.

Q. How did you hear you were going up to Point Reyes?

A. He gave us orders the evening before.

The COURT.—Q. Who did?

A. The port engineer.

Mr. LILLICK.—Q. What did he tell you?

A. He told me we had to leave early in the morning with the pile-driver for Port Reyes.

Q. Who was working with you as deck-hand at that time?

A. Pete Mirchini, the man I had down at Santa Cruz with me.

Q. Who was your deck-hand upon the trip down?

A. You mean with the pile-driver?

Q. Yes. A. H. B. Anderson.

Q. When you took the pile-driver up, will you tell us what you did the following morning about picking up the pile-driver, and how you got your

(Testimony of Charles Kruger.)

hawser, and how you got your bridle, if you did get one and put it on the pile-driver?

A. We had the bridle on board on the pile-driver already. We just went aboard and made our lines fast to it. [67]

The COURT.—Q. That is, the bridle was already rigged and fastened on the barge: Is that what you mean? A. Yes, sir.

Q. Who did that?

A. That was when we got it here at Pier 46.

Mr. LILLICK.—Q. You mean you got it from Pier 46? A. Yes, sir.

Q. Did you get it? A. Yes.

Q. I understood you a moment ago to say that when you went down there the bridle was already on the pile-driver? A. Yes.

The COURT.—Q. You mean you got the barge from Pier 46?

A. Yes; I got the barge from Pier 46, with the bridle aboard, and took it down to Pier 23. That was the day before.

Mr. LILLICK.—Q. Who gave you the bridle?

A. The bridle was aboard the barge.

Q. Do you know anything about where the bridle came from? A. I do not know.

Q. When you got down to the pile-driver, how many men were on her?

A. There were no men on board of her, with the exception of myself and the deck-hand.

Q. I am not talking about your trip up there.

(Testimony of Charles Kruger.)

A. There were only two of us aboard the boat at the time.

Q. When you went down to pick up the pile-driver, was she moored to a pier?

A. Down to Pier 46?

Q. Yes, down to Pier 46.

A. She was pulled out from the inside by another tug.

Q. And you took her from the other tug, did you? A. Yes, I lashed alongside of her.

Q. Now, will you tell us what you did about getting her out to sea and up to Drake's Bay?

A. That was the next day that we started up. We went alongside and put our lines aboard her and made fast to the bridle. [68]

Q. Who made fast to the bridle?

A. My deck-hand and myself; we put a bow-line on her.

Q. Where was the bridle at that time?

A. It was right over the bitts.

Q. Already fixed in the place which you used for the bridle when you actually took the tow up?

A. Yes, sir.

Q. Who tied on your hawser to the bridle?

A. The deck-hand and myself.

Q. At that time did you notice the shackle at the end of the bridle?

A. I did not; I didn't look at it; we just merely made fast to it and started out.

Q. Do you know from your tow whether at that time the shackle had a thimble attached?

(Testimony of Charles Kruger.)

A. Yes, I know she had a thimble in the shackle.

Q. Do you know whether or not at that time on your up trip that thimble was working?

A. You mean the swivel?

Q. Yes, the swivel.

A. It must have been working, because the bridle was working at all times, there were no turns in it.

Mr. HEIDELBERG.—I move to strike out that answer.

Mr. LILLICK.—It may go out.

Q. How do you know whether the swivel was working in the bridle on your up trip, if you do know that?

A. Well, if the swivel was not working, we would have had some turns in the bridle, but the bridle was clear.

Q. Were there any men on the pile-driver or on the barge beside the pile-driver on your up trip? A. No, sir.

Q. How long did it take you to make that trip?

A. I left here about four o'clock in the morning and got up there about five or six in the evening; it took me over nine hours to tow it up.

Q. On your own vessel at that time what men were there? [69] A. My deck-hand.

Q. On the up trip, how did the weather or the sea compare with the weather and the sea on your down trip upon which the accident happened?

A. We had a strong northwester to buck all the way up.

(Testimony of Charles Kruger.)

Q. How about the sea?

A. It was a choppy sea; half the time we could not see whether the barge was coming behind us, or not. The sea broke right clean over her. There was a pretty strong northwest wind blowing at the time we went up.

Q. How about the water on your own bow?

A. We were taking water over our bow ourselves.

Q. Was there any swell at that time going up?

A. There was a rough sea; the water was going clean over the bow.

Q. When you first started that morning, did you start towing up with only one gas-boat, the "Three Sisters"?

A. No, sir, the "Corona" was ahead of us.

Q. And towing with a single line attached to your bow? A. Yes.

Q. So that on the hawser which you used going up there was on one end the barge and the pile-driver, and on the other end the "Corona" ahead of you towing in tandem on the same line?

A. Yes, sir.

Q. Where did the "Corona" drop you?

A. At buoy No. 3, opposite of Point Bonita.

Q. Is that out beyond the Gate? A. Yes, sir.

Q. Do you know anything personally about the "Corona" and whether between the time when you went up with the pile-driver and when you brought her back the "Corona" went up to Point Reyes. to this pier?

(Testimony of Charles Kruger.)

A. You mean the same day I went up?

Q. No, I mean in the time between.

A. Yes, she has been going up and down every day. [70]

Q. So that from the time you went up with the pile-driver first and the time she was brought back by you, the "Corona" was running every day?

A. Yes, sir.

Q. What was she doing running in there, if you know? A. She went up for salmon.

Q. When she went up for salmon, do you know whether she went in to that pier at all?

A. Sometimes she carried lumber up there.

Q. Do you know whether she carried anything besides lumber? A. She carried passengers.

Q. Now, coming to the voyage back, will you tell us from whom you received your instructions about going up to get the pile-driver?

A. The port engineer.

Q. About when was that?

A. I know I got the orders the night before, and I left in the morning to go up.

Q. You don't remember what date?

A. I do not remember, no, sir.

Q. What did the port engineer tell you?

A. He told me to go up and get the pile-driver and bring it down—the barge.

Q. When you went up, what equipment did you have on the "Three Sisters" for the tow?

A. The tow-line and the bridle.

Q. Were they or were they not the same tow-line

(Testimony of Charles Kruger.)

and bridle that you had used when you took the pile-driver up? A. Yes, sir.

The COURT.—Q. To whom did the pile-driver belong—did it belong to the barge? A. Yes, sir.

Q. How did you happen to have it down here? Did you bring it back with you and keep it on board? A. Yes, sir.

Mr. LILLICK.—Q. It was kept on board the "Three Sisters" all of the time?

A. Yes, all of the time, after I took the barge up I came back and went down to Santa Cruz and I had that bridle aboard all of the time. [71]

Q. Where was it during the time it was on the "Three Sisters"?

A. Stored down in the hold.

Q. Was the hold during that time awash at all?

A. No, sir.

Q. Any water in it at all during that time?

A. No, sir, it was dry.

Q. Are you sure of that? A. Yes, sir.

Q. When you left, you say Mr. Davis told you to go up and get the pile-driver. I would like to have you tell us just what he said, and when he said it, and the words he used.

A. He told me the night before, "You have orders to go up and bring the pile-driver down, they are supposed to be done with the pile-driver up there, you bring the pile-driver down to San Francisco."

Mr. BELL.—Did I understand you, Mr. Lillick, to say that this was Mr. Davis?

(Testimony of Charles Kruger.)

Mr. LILLICK.—Yes. Mr. Carlton was supplanted by Mr. Davis in the meantime.

Q. Did you hear anything from anybody at all about going up to Point Reyes, and anything about that trip, other than what Mr. Davis, the port engineer told you? Did you get any other instructions whatever? A. No, sir.

Mr. HEIDELBERG.—If your Honor please, I would like to ask a question now. I understand that the contention here is that Paladini was without knowledge of this, and that they are now seeking to show that the port engineer gave these instructions to this captain. Of course, under the rules in ordinary civil cases, all of this testimony would be inadmissible, because it is immaterial, irrelevant and incompetent, and is not binding on these defendants in any way, but I presume in this kind of proceeding it is permissible, and, therefore, I [72] have no objection.

The COURT.—Of course, the test is the presence and the knowledge of the owner of the vessel.

Mr. HEIDELBERG.—Yes, your Honor. It is not binding on the defendants in any manner at all.

The COURT.—It is binding on them to the extent that it bears on the question as to whether or not the owner of the boat is to be allowed to limit.

Mr. HEIDELBERG.—I just wanted to have it clear in my own mind.

The COURT.—That is all.

Mr. LILLICK.—Q. On your arrival at Point Reyes, what occurred?

(Testimony of Charles Kruger.)

A. I went up there and Mr. Carlson told me they were not ready with the pile-driver to come down.

Q. You say Mr. Carlson? A. Yes.

Q. Who was Mr. Carlson?

A. The foreman of the Healy-Tibbitts Construction Company at the time.

Mr. LILLICK.—Mr. Carlson, your Honor, is one of the claimants in this case, one of the men injured.

Q. What, if anything, did Mr. Carlson say to you about waiting?

A. He told me to wait until they were ready. I was up there three days before I came down.

Q. Do you know what they were doing in the meantime with the pile-driver?

A. Yes, they were using the pile-driver at the dock at the time.

Q. Did you communicate with the San Francisco office of Paladini & Co. during those three days?

A. No, sir. I sent word down by the "Corona" that we were not coming down, that we were waiting for the pile-driver.

Q. When did you see the "Corona" first after having arrived [73] and having learned that the pile-driver was not yet ready to go back?

A. She came up the same day I went up.

Q. What was she doing there?

A. She went up to see if there was any salmon to go back. She went back every day.

(Testimony of Charles Kruger.)

Q. Did you see her again before you came back with the pile-driver?

A. She was up there the day before. I started with the pile-driver about two o'clock, about three o'clock in the afternoon; I don't remember just exactly the time it was.

Q. Do you know whether the "Corona" went up or started up to Drake's Bay on the day you started back?

A. No, sir, I did not know whether she was coming up or not.

Q. But did you see her that day? A. Yes, sir.

Q. Where did you see her?

A. After we started from Point Reyes with the barge to come down.

Q. Was she coming up? A. Yes, sir.

The COURT.—Q. You passed her?

A. No, sir, she passed me. I was coming down. After the accident was the time we saw her.

Q. You were going in opposite directions?

A. Yes, sir.

Q. She was going up and you were coming down? A. I was coming down.

Mr. LILLICK.—Q. Do you know whether the "Corona" ever carried any equipment, or passengers, or men back and forth to that job?

Mr. HEIDELBERG.—That is objected to as immaterial, irrelevant and incompetent.

Mr. LILLICK.—It is material in this sense, your Honor: Our facts will develop a situation where your Honor will see that the men asked to

(Testimony of Charles Kruger.)

come back on the pile-driver instead of on the regular means provided for their transportation.

The COURT.—Objection overruled. [74]

A. She did.

Mr. LILLICK.—Q. On the day you started from Point Reyes, who gave you the instructions there to prepare to take the pile-driver down?

A. Mr. Carlson.

Q. What did he say to you?

A. He called me over and told me that they were done with the wharf and for me to go alongside. They picked up the anchors first. I was alongside. From the pile-driver I went to the F. E. Booth wharf and got their camping utensils there.

Q. Whose camping utensils do you refer to?

A. The men who were up there working, the pile-driver gang.

Q. Who asked you to do that?

A. Mr. Carlson.

Q. Before going up to Point Reyes, had you received any instructions from your port engineer, or from Paladini's to pick up these things?

Mr. BELL.—I object to that as leading.

Mr. LILLICK.—Withdraw the question.

Q. Before leaving San Francisco, had you or had you not received any instructions with reference to bringing back anything other than the pile-driver?

Mr. BELL.—The same objection.

A. No, sir.

Mr. LILLICK.—Q. When you went up to the

(Testimony of Charles Kruger.)

Booth pier to get these things, who went with you, if anyone? A. The men from the pile-driver.

Q. How many of them?

A. Nearly all of them.

Q. How many, in number, would you say?

A. I think there were seven men in number, all together.

Q. That is, they were on the "Three Sisters"?

A. Yes, and I went over and got their things for them.

Q. Who loaded the things on the "Three Sisters"? [75]

A. They loaded part of their stuff themselves, and we also helped them.

Q. What were they?

A. Bedding, iron cots, some provisions and a stove.

Q. Where were those placed on the "Three Sisters"? A. They were on the port side.

Q. Where was the bedding, the blankets and the mattresses?

A. The mattresses were put over the skylight of the engine-room.

Q. Will you step over to the chart, here, and indicate where they were. Just indicate on the diagram here where the iron cots were placed.

A. Right in here.

Q. We will call that X–1. Will you indicate where, other than that, upon the "Three Sisters," the rest of the equipment was placed, and tell us

(Testimony of Charles Kruger.)

as you point it out what it was and where it was placed.

A. The mattresses were piled on top of the skylight of the engine-room.

Q. Do you mean to indicate only the forward portion of it?

A. It is a small skylight; it would take about half the skylight to cover it.

Q. I will mark that X–2. Where was the stove placed? A. Back of the mattresses.

Q. On which side? A. On the port side.

Q. I will call that X–3. Anything else?

A. The stores were piled up along here.

Q. You mean on the port side of the pilot-house?

A. Yes.

Q. They were on the port deck, right alongside the pilot-house?

A. Yes, in the wing of the house.

Q. I will mark that X–4; did they fill that passageway completely? A. Yes, sir.

Q. In order to get to the forward deck, then, how would you get there from the after deck?

A. You had to go on the starboard [76] side.

Q. You said that the other equipment was placed there at X–4 on the port side: What was that other equipment?

A. Groceries and boxes, and pots and pans.

Q. What was there on the forward deck?

A. There was nothing on the forward deck.

Q. You are sure of that?

A. Yes; the forward deck was clear.

(Testimony of Charles Kruger.)

Q. What was there on the after deck?

A. There was some bedding, and the clothes of the men, and some suitcases on top here, and part of them were back here; the tent was back here also.

Q. The point marked here by the funnel, which I will connect with the part you have marked by the mast, I will call that X–5.

A. There were two tents there.

Q. What occupied the space aft of the mast and down to the rail? A. There was nothing there.

Q. Are you sure of that?

A. Nothing that I can remember.

Q. I call your attention to a dotted line apparently indicating a hatch in the after deck: What was that?

A. That is the way you go down to the hold of the boat.

Q. Was that open or closed on this occasion?

A. It was closed.

Q. Was there anything on top of that hatch?

A. Not that I know of.

The COURT.—We will be in recess until two o'clock.

(A recess was here taken until two P. M.) [77]

AFTERNOON SESSION.

CHARLES KRUGER, direct examination (resumed).

Mr. LILLICK.—Q. Captain, when you went up alongside of Booth's wharf, to take off the bedding,

(Testimony of Charles Kruger.)

and the stove, and the other things that were loaded on the "Three Sisters," who decided where those various things would be put on the boat?

A. They just put them on as they got them.

Q. Did you have any part in ordering them to be placed one in one position on the boat and another in another? A. No, sir.

Q. Was there any room in the forecastle for the men? A. Yes, sir.

Q. And what with reference to the galley, was there anything in the galley?

A. There was a stove in there, but there was room in there also.

Q. How much room was there there?

A. For one or two men to sit in there.

Q. Where did you eat in the boat?

A. We ate any place.

Q. Was there room in the galley for a table?

A. No, sir.

Q. On the bow of the boat, how much space was there, approximately?

A. From the pilot-house clean to the bow of the boat.

The COURT.—Q. And how far was it from the pilot-house to the bow?

A. About ten or fifteen feet, I should judge.

Mr. LILLICK.—Q. And how was it as to the top of the house, was there any room there unoccupied by the mattresses and the bedding that were put up there?

(Testimony of Charles Kruger.)

A. Back of the hatch where I go down into the engine-room was clear.

The COURT.—Q. Room for how many men in the forecastle?

A. At least four men could go in the forecastle.

Mr. LILLICK.—Q. After you had loaded these stores and [78] provisions on board of the "Three Sisters," where did the boat go?

A. Alongside the pier.

Q. Were any men on the pile-driver, or on the barge on which the pile-driver was, at the time you came back? A. No, sir.

Q. Where were the men who finally got on the "Three Sisters"?

A. They came with us after they had their things on board and we went alongside the barge.

Q. And after you got alongside the barge, where did the men go?

A. They went on board the barge.

Q. How long did they stay on board the barge?

A. They stayed there until I started out with the tow.

Q. When you threw off your lines at the pier and started out, how was the "Three Sisters" made fast to the barge?

A. She was ahead of the barge.

Q. Where was the line attached?

A. To the starboard bitt. We fastened it with a short line.

Q. On the starboard bitt of what vessel?

A. The "Three Sisters."

(Testimony of Charles Kruger.)

Q. So that the hawser ran from the starboard bitt of the "Three Sisters" to what on the barge?

A. The bridle.

The COURT.—Q. Where are these bitts on the "Three Sisters"? A. On the stern of the boat.

Q. Do you mean right at the stern?

A. Yes, close to the quadrant.

Mr. LILLICK.—Q. About how far from the stern of the boat were those two bitts, say from the rail?

A. Those two bitts were about a foot and a half away from the rail.

Q. Was there one on each side? A. Yes.

Q. When you came back to the barge and the pile-driver, before you made fast to tow out, where was the bridle?

A. Aboard the "Three Sisters." [79]

Q. Who took it off the "Three Sisters" and affixed it or attached it to the barge?

A. The men on the barge.

Q. How was it put on the barge?

A. Over the bitts.

Q. Similar bitts on each side of the bow of the barge? A. One on each side of the barge.

The COURT.—Q. Pretty close to port and starboard, were they? A. Yes, sir.

Mr. LILLICK.—Q. Were they made fast in any way except to slip the loop at the end of the bridle over the bitts on the barge?

A. No, sir, they slipped right over on the bitt.

Q. Was the hawser at that time when the bridle

(Testimony of Charles Kruger.)

was slipped over the bitts attached to the bridle.

A. Yes, sir.

Q. Had it been in the same position on that bridle at the time you left it when you brought the pile-driver and the barge up to Point Reyes? In other words, had they been taken apart?

A. Yes, sir, they were taken apart once before.

Q. When was it put together again?

A. At the time we went up to get the pile-driver.

Q. On the way up, or was it after you got there?

A. After we got up there.

Q. Was that done at the same time that the bridle was put on?

A. We made the barge fast ourselves with the line to the "Three Sisters."

Q. I am speaking of the fixing of the hawser at the end of the bridle, when was that done, and by whom?

A. That was between Anderson and I. We put a bow-line on it.

Q. Do you know from your examination of that at the time you tied the hawser on with that bow-knot whether the swivel was working or was not working?

A. I could not say, for I didn't look at it. [80]

Q. After you started out with the line, as you have explained you had it fixed to the barge, and on your way out for the first fifteen minutes or half an hour, where were the men who put their provisions on the "Three Sisters," were they on the barge or were they on the "Three Sisters"?

(Testimony of Charles Kruger.)

A. Mr. Carlson and the cook were on board the "Three Sisters," and the rest of the crew were on the pile-driver.

Q. How far did you proceed before you made any change in your hawser?

A. We went as far as the bell buoy outside Drake's Bay.

Q. How far was that from the place where you started with the barge?

A. It takes about 15 or 20 minutes running time to get out.

Q. In miles, how far would that be?

A. About a mile and a half or two miles, probably.

Q. How was the water between the bell buoy and the pier, smooth or otherwise? A. Yes, smooth.

Q. Why did you change your tow-line?

A. I started out with a short tow-line first, until the men got done on the barge, and when they got done Mr. Carlson said they were done on the barge. They were fixing their things on the barge.

Q. What did they have to fix on the barge?

A. To get everything tightened up so that in case it started to roll from one side to the other nothing would be lost overboard.

Q. What did they have on the barge?

A. They had some piles and some stuff that they used there.

Q. When you changed your hawser, what change did you make in it. A. We lengthened the line.

Q. To what length?

(Testimony of Charles Kruger.)

A. I should say between 450 to 500 feet, all we had on board, and part of it was on board yet. [81]

Q. When you made that change in the line, where did the men on the barge go?

A. They came aboard after I lengthened the line out; they were aboard when I started to lengthen my line out.

Q. Did you ask them to come on board, or did they ask you whether they could come on board?

A. They were supposed to come down on the "Corona" that night, and—

Mr. HEIDELBERG.—Now, just a minute. We ask that that be stricken out, your Honor, that they were supposed to come down on the "Corona."

The COURT.—Yes, let that go out.

Mr. LILLICK.—Q. I am speaking of the time when they came on board the "Three Sisters," did you ask them to come on, or did they ask you to come on, or how did that happen?

A. They said they wanted to go down, and I said, "All right."

The COURT.—Q. All of these men except Carlson and the cook were on the barge, weren't they?

A. Yes.

Q. Then they came aboard the "Three Sisters," didn't they? A. Yes.

Q. Now, did they ask to come aboard, or did you ask them to come aboard?

A. They asked to come aboard. They told Mr.

(Testimony of Charles Kruger.)

Carlson they were finished on board the barge, and they wanted to come aboard the "Three Sisters."

Q. And did they come aboard? A. Yes, sir.

Q. After they came aboard, where did they go?

A. They were standing around on the deck.

Mr. LILLICK.—Q. When your tow got straightened out and you had the 450 or 500 feet of line out, and the tow actually commenced, was anything said on board about the after portion of the "Three Sisters"? A. Yes, sir. [82]

Q. What was said?

A. To keep clear of the tow-line.

Q. Who said that? A. I did.

Q. To whom did you say it?

A. To the men who were standing back aft.

Q. Where did they go, if they did move, after you told them that?

A. Three came up forward, and one was shaving in the galley, and the other four were playing cards aft.

Q. Where did the three men forward go? Did they go in front of the deck-house, or where did they go?

A. In front of the pilot-house.

Q. How long was it from that time until the accident?

A. About an hour and a half, I should judge; about an hour and a half after we were under way.

Q. What have you to say as to the condition of the sea during that hour and a half?

(Testimony of Charles Kruger.)

A. I was getting some ground swells and the further we got the bigger the ground swells got.

Q. What course were you steering from the time you straightened out the tow at the bell buoy up to the time of the accident?

A. East by south, half south.

Q. During that time from what direction were those ground swells coming?

A. Westerly swells.

Q. What was the first thing you know about anything happening?

A. I was standing in the pilot-house and Mr. Anderson, the deck-hand, was alongside of me; he was at the wheel, and I was looking out of the window of the pilot-house, just by the pilot-house control, and I seen the port side of the bridle break, and so I put the boat neutral, but the boat had so much force that the other side of the bridle broke. That is all I seen of the accident. I think Scotty said somebody got hurt. I went back there and I seen Mr. Sauder and Mr. Carlson unconscious. [83]

Q. You say you were standing alongside of what? A. The pilot-house control.

Q. What is the pilot-house control; will you explain it to us?

A. Yes; it is the control by which you can put the boat neutral and go ahead and back up.

Q. How is that attached to the engine? Is it attached by a lever or by a wheel?

(Testimony of Charles Kruger.)

A. It is a wheel, and the rod is under the floor in the engine-room; it runs up to the pilot-house.

Q. At the time you saw the bridle part, where were the three men whom you say had gone to the forward part of the "Three Sisters"?

A. They were standing right alongside the pilot-house talking to Mr. Anderson, who was standing at the wheel.

Q. On which side was the wheel?

A. The pilot-house control was on the port side.

Q. With the wheel in the center?

A. No, it is on one side.

Q. In other words, the wheel was on the starboard side and the pilot-house control was on the port side?

A. No, sir; the wheel that you steer with is in the center of the pilot-house, and the control is to one side.

Q. Were those three men at the starboard window or at the port window?

A. At the starboard window.

Q. Was that the position on the "Three Sisters" from which, had there been any sea breaking, the sea would have washed over?

A. There was no sea breaking.

Q. There was no sea breaking? A. No, sir.

Q. With the course that you were then steering, where did the swell strike the "Three Sisters," on which side or quarter, or in what manner?

A. About quarterly.

Q. Quarterly from which side?

(Testimony of Charles Kruger.)

A. Starboard side.

Q. Quarterly from the starboard side?

A. Yes, sir. [84]

The COURT.—Q. That is, it was a westerly swell? A. Yes, sir.

Q. You were coming south?

A. We were coming from the west and were going south.

Mr. LILLICK.—Q. During the time from the buoy to the point where the accident occurred, had you noticed whether the tow-line was in or out of the water between the barge and the "Three Sisters"? A. Yes, sir.

Q. What was the situation?

A. When she was going ahead, part of the time the line would be in the water, and sometimes it would jump right out as it was running with the sea.

Q. What is the explanation, if you have any, of the reason for the bridle parting?

A. Well, the way I could explain it is the barge was at times swinging from one side to the other, and going with the sea, and sometimes my boat would go ahead, the "Three Sisters," and jerk the line when it got between the seas and running with the sea.

Q. During any portion of the time from the buoy up to the accident, did you have occasion to change the speed of the "Three Sisters"? A. Yes, sir.

Q. What was the occasion, and what did you do about the speed?

(Testimony of Charles Kruger.)

A. When we got heavy into ground swells, I slowed down into half speed.

Q. How long had you been running at half speed prior to the accident?

A. Probably about half an hour or a little longer, I could not tell exactly.

Q. When the bridle broke, what did you do?

A. I got the boat neutral and the line out. I saw the "Corona" coming. So I asked the captain of the "Corona" if he could take the men ashore; he said he had some trouble with his pump. So then I said, "I will go ahead in with the men and you stand by the [85] barge." So I came in as fast as I could with the "Three Sisters."

Q. You say the "Corona" was coming out. Do you know where she was going?

A. To Point Reyes.

Q. For what purpose?

Mr. BELL.—That is objected to as calling for the conclusion of the witness.

Mr. LILLICK.—Q. If you know. Do you know what she was going there for? A. Yes, sir.

Q. What for?

A. To pick up salmon, to bring in the salmon from Point Reyes.

Q. For what purpose did they use the pier at Point Reyes?

A. That is the place they got the salmon.

Q. When you say the "Corona" was going to Point Reyes to get salmon, would she go to the pier and load from the pier?

(Testimony of Charles Kruger.)

A. No, sir. She was there alongside the barge. We had barge No. 16 at anchor, to which we brought the salmon, before the pier was built.

Q. Where was that barge with relation to the pier?

A. She was anchored about 400 or 500 yards out from the wharf.

Q. While the tow was proceeding, before the men were hurt, what clearance was there between the hawser and the men—say the tops of their heads, what would you say as to the distance?

A. Practically pretty even with the railing of the boat, the tow-line was.

Q. Would it be above their heads, or even with their heads? A. Below their heads.

The COURT.—Q. How far is the rail above the deck?

A. About 18 or 20 inches.

Q. How far up on the mast was the line fastened?

A. Right below the roof of the house [86]

Q. Referring to the diagram, what is that going up to the mast—is that a boom? A. Yes.

Q. Was the line fastened below that boom?

A. Yes.

Mr. LILLICK.—Q. How far was the line, itself, in inches, from the deck? How far was the line on the mast where it was made fast, from the deck, approximately?

A. That is pretty hard to explain; apparently about 18 inches, 18 or 20 inches from the deck the line was fastened to the mast.

(Testimony of Charles Kruger.)

Q. Now, going back to the position of the men and that line, the hawser, itself, fixed as it was to the mast, would be at a position where, looking aft? Can you tell us in what position with reference to the port and starboard side the hawser went down the center line of the vessel?

A. It would be in the center of the boat.

Q. It would be in the center of the boat?

A. Yes, sir.

Q. Now, as to the men, were they on the port side of that hawser, or on the starboard side of that hawser?

A. They were on the starboard side of the hawser.

Q. How far away from the hawser?

A. Three or four feet, probably.

Q. You have told us the "Three Sisters" was 18 feet beam; having that in mind, can you tell us about what the distance would be, in feet?

A. That was close to amidships and it tapers in there.

Q. There was space on the after deck, on each side of the hawser, was there? A. Yes.

Q. What, if anything, kept that hawser from swinging to the starboard side or the port side when the barge swerved or sheered—was there anything there?

A. Yes, there are two leads on that boat, leads for the rope. [87]

The COURT.—Q. They are built from the rail, are they?

A. Yes, sir, they are iron leads.

(Testimony of Charles Kruger.)

Q. In the rail, or, rather, on the rail?

A. Yes, sir.

Mr. LILLICK.—Q. How far apart are those two leads?

A. They are in line with the house; the line leads in straight from the gypsy-head at the side of the boat when you heave in the line.

Q. Give us the distance from the port lead to the starboard lead on the after rail.

A. I could not tell you exactly, but probably 10 or 12 feet.

Q. So that on the after end of the deck, there was a space within which that hawser or line could play affixed to the mast, as it was, of the distance you have expressed from lead to lead. Is that true?

A. Yes, sir.

Q. Did the men make any reply to you when you told them to keep clear of the line back there?

A. No, sir.

Q. Was that all that was said about that?

A. Yes, sir.

Q. Had they commenced to play cards at the time you told them to stay away from that place?

A. No, sir. That was when we started out first. They had coffee first, and after they had coffee they went back and played cards back there at the starboard bitt, as I remember it.

Q. Do you know at what time they went aft, after they had coffee? A. I could not tell you.

Q. So that when you told them to keep clear of the line, they went forward and had their coffee?

(Testimony of Charles Kruger.)

A. That was when we first started out, that is when I told them to keep clear of the lines aft.

Q. And where did you go then?

A. I went into the pilot-house then, at the time.

Q. From that time until the accident, did you come out of the [88] pilot-house again?

A. At the time of the accident?

Q. Yes. A. Yes.

Q. I mean from the time you told them to stay clear of the line and you went into the pilot-house, did you come out of the pilot-house again until the time of the accident? A. Oh, yes.

Q. For what purpose, and where did you go?

A. I went down to the engine-room.

Q. How did you get to the engine-room?

A. You have to go on deck and go around starboard and come down the after deck and down that hatch; it is right in between the decks.

Q. From the pilot-house to the hatch, you come around the starboard hatch alongside the pilot-house, do you?

A. Right alongside the house, yes.

Q. How long did you stay in the engine-room?

A. Just time enough to oil up.

Q. And then what did you do?

A. I went back to the pilot-house.

Q. Had the men commenced to play cards before you went down there? A. Yes.

Q. So they were playing cards as you went by?

A. Yes.

Q. Then did you go back to the pilot-house again?

(Testimony of Charles Kruger.)

A. Yes, sir.

Q. Did you come out again before the accident?

A. No, sir.

Q. During all that time did you ship any water, Captain? A. No, sir.

The COURT.—Q. Where was the wind?

A. Very light northwester. It was right astern of us. There was no choppy sea at all. There was just an ordinary heavy ground swell.

Mr. LILLICK.—Q. Have you ever had an accident of any character on board a vessel you were operating, until this one?

Mr. HEIDELBERG.—That is objected to as immaterial, irrelevant and incompetent. [89]

Mr. LILLICK.—I only wanted to show that the captain was qualified. I wanted to show that he had never had another accident, that he had been operating on motor-boats for the period of time he has testified, and that he has never had any accident. I just want to show it, your Honor, for whatever it may be worth. It may not be worth a great deal.

The COURT.—I do not think it is competent, Mr. Lillick; I will sustain the objection.

Mr. LILLICK.—Very well, your Honor.

Q. What experience, if any, had you with the "Three Sisters," or other similar motor-boats, in the way of towing?

A. All the towing I did was towing outside, barges back and forth to Point Reyes, and from

(Testimony of Charles Kruger.)

Point Reyes to Bodega. Sometimes I towed up the river.

Q. Have you ever performed any salvage service? A. Yes.

Q. When, and where, and what was it?

A. I think it was in 1920—no, it was in 1919. I was going out to meet a net boat, and while I was going out—

Q. What boat was that?

A. The "California." She was a boat about 58 feet long and 15 feet beam. She had a 75-horsepower engine in her. I got outside and I heard some whistles out there; so I got close to them, and when I got alongside the captain asked me if I could take a line, that he was sinking. That was the steam schooner "Coquille." I towed him into Drake's Bay and put him on the beach.

Q. Had you used this same hawser and bridle on any other occasion in towing? A. Yes, sir.

Q. When and for what tow?

A. I towed barge 16 up from pier 23 to Point Reyes, Drake's Bay.

Q. When?

A. That was right after the pile-driver had gone up there. [90]

A. How large a barge was barge 16?

A. Quite a good-sized barge.

Q. How does she compare in size with barge 61?

A. Oh, you could put the 61 inside of that barge.

Q. You could? A. Yes.

(Testimony of Charles Kruger.)

Q. What was the horsepower of the engine in the "Three Sisters"?

A. 135, Enterprise Diesel.

Mr. LILLICK.—That is all.

Cross-examination.

Mr. HEIDELBERG.—Q. You say you have a certificate or a master's license?

A. I have an operator's license.

Q. You have an operator's license?

A. Yes, sir.

Q. And that license merely authorizes you to operate a gasoline launch, doesn't it?

Mr. LILLICK.—Now, I object to that, your Honor, on the ground that the certificate is the best evidence. If there is to be any question about what it is, let us have the certificate, itself.

Mr. HEIDELBERG.—Yes, that is just exactly what we want. We want the certificate, itself. We will put the certificate in evidence. We call upon you to produce it.

Mr. LILLICK.—We will produce it to-morrow morning.

Mr. LINGENFELTER.—Mr. Dolan, of the Inspection Bureau, will testify to its existence if for any reason it cannot be produced.

Mr. BELL.—And at the same time I would like to demand the production of the broken hawser and the bridle, and also the certificate of inspection of the "Three Sisters."

Mr. LILLICK.—I am told this, Mr. Bell: I asked the same question, practically, about the

hawser and the bridle, and I was told that the first that they had heard of any chance of their being called upon to pay for any loss sustained was some [91] six months after the accident, and that in the meantime they had not gone into the matter with a lawyer, or with anyone else, and that the bridle and the hawser are as little known to us as they are to you. We know nothing about them. I am told that Mr. Lingenfelter tried to find out about them, but that they disappeared.

Mr. BELL.—Then I think that Paladini should account for what happened to them.

Mr. LILLICK.—All right, we will ask Mr. Paladini about them when he takes the stand.

The COURT.—Which inspection certificate is it you want, Mr. Bell?

Mr. BELL.—The inspection certificate issued by the inspectors for the "Three Sisters."

The COURT.—Issued when?

Mr. BELL.—Issued immediately before this accident. I refer to the one she was operating under at the time that this accident occurred.

Mr. LILLICK.—We will produce it if we have it.

Mr. LINGENFELTER.—Under what act of Congress, Mr. Bell, do you maintain that that vessel should have been inspected?

Mr. BELL.—If she carried passengers she had to be inspected under Section 4493 of the Revised Statutes.

(Testimony of Charles Kruger.)

Mr. LINGENFELTER.—That only covers steam vessels, doesn't it?

Mr. BELL.—I think not. That act was amended in 1917.

The COURT.—Well, Mr. Bell wants the last inspection certificate before the accident. If you have not any, that, of course, settles that.

The WITNESS.—May I have a word with you, your Honor?

The COURT.—Yes. [92]

The WITNESS.—They are talking about inspection of fishing boats. Gasoline boats or Diesel boats under 65 feet are not inspected; steamboats are, but not these boats; we are not hired by passengers.

Mr. HEIDELBERG.—Well, we call for the certificate, whatever it may be.

Mr. LILLICK.—If we have any we will produce it. According to my understanding, it is unnecessary to have any inspection of a vessel of this size—just the same as with a yacht.

Mr. LINGENFELTER.—Mr. Davis, now the port engineer, is here, and we may be able to clear this matter up through him right now.

The COURT.—The best way is to find out whether you have a certificate, and if you have produce it; if you have not let us know about it tomorrow, and that will be the end of it.

Mr. HEIDELBERG.—Q. You say you were on the "Three Sisters" all the time you were working for Paladini? A. Yes, sir.

(Testimony of Charles Kruger.)

Q. And you say you consulted wth the port engineer at various times? A. Yes, sir.

Q. Did these consultations take place in the presence of Mr. Alex Paladini sometimes?

A. No, sir.

Q. Did they take place in the office?

A. No, sir.

Q. Didn't you ever visit the office of Paladini & Co.?

A. At the end of the month when we got our money.

Q. That is the only time you would ever go around, to get your money? A. Yes, sir.

Q. And where would you see Mr. Carlton?

A. Down at the dock, down at Pier 23.

Q. And you also saw Mr. Davis down there?

A. Yes.

Q. He would be in there when you came in, and when you would go out?

A. Sometimes he would be there, and sometimes he [93] would not be there; it depended on what time we got in.

Q. Was he there at various times when you got in? A. Yes, sir.

Q. Was he there at the time when you had these men on board taking them over to Point Reyes?

A. No, sir.

The COURT.—Does the rule in regard to the presence of the owner apply to any time except the time when the tow is actually begun?

Mr. LILLICK.—Certainly not, your Honor. That is our contention.

The COURT.—My impression of it was that in limitation matters the high officers of the corporations or the owner must have been present at the time that the voyage actually started; it would make no difference whether arrangements were made at some other time, or not.

Mr. BELL.—I think, if your Honor please, that is considerably qualified by the decision of Judge Dooling in the "Santa Rosa," where he allowed the matter to be gone into for a considerable period before.

The COURT.—Well, perhaps I had better take the testimony, because I am not very clear on it myself.

Mr. LILLICK.—I think, Mr. Bell, you are in error in respect to that, because I happened to be interested in the "Santa Rosa," and the "Santa Rosa" went off on the point of the owners having privity through their having advised the captain what he should do, the captain having advised with the home office as to the operation of taking the passengers from the vessel to the shore.

The COURT.—That is a very different thing.

Mr. LILLICK.—That is a very different thing, yes, your Honor.

Mr. BELL.—I don't like to discuss the matter before the [94] witness now, your Honor, and I would prefer to take the testimony.

Mr. LILLICK.—All right, we have no objection.

(Testimony of Charles Kruger.)

The COURT.—Very well, go ahead.

Mr. HEIDELBERG.—Q. Who was the port captain when you first took the tow from Pier 46?

A. You mean the port engineer?

Q. The port engineer, yes. A. Mr. Carlton.

Q. Was Mr. Carlton down at Pier 46 when you took the tow? A. No, sir.

Q. Did Mr. Carlton furnish you with the tackle that you used there, the swivel and the bridle?

A. No, sir.

Q. You have testified, haven't you, that you came up to Pier 46 and found the barge there and found the bridle already on the barge? A. Yes, sir.

Mr. LILLICK.—I will ask that that answer go out, your Honor, I would rather, if this course of inquiry is to be pursued, have counsel frame his questions so that they will not start with, "You have testified, have you not," because if the testimony he has given is to be the guide, we should have the testimony read. I think counsel can frame his questions clearly enough along that line.

The COURT.—Don't you remember Prof. Wigmore's discussion of that question, Mr. Lillick? He says, after reviewing all the authorities, that it is proper enough to ask a witness, "Did you not testify so and so," or "Have you not testified so and so," basing it on one English case to the effect that witnesses who are deliberately falsifying will frequently forget between the morning and the afternoon.

Mr. LILLICK.—I withdraw the objection.

(Testimony of Charles Kruger.)

Mr. HEIDELBERG.—Q. So that that is the fact, isn't it, when you got to Pier 46 you found the barge there waiting for you with the bridle already attached? A. Yes, sir. [95]

Q. And you didn't make any investigation at that time of the swivel, did you? A. No, sir.

Q. You didn't know whether or not that swivel would work, did you? A. No, sir.

Q. And you don't know right now whether or not at that time or at any subsequent time that swivel was rusted so bad that it would not turn, do you? A. No, sir.

Q. Did you use that swivel and that bridle in between the time you took this barge this day to Point Reyes and the time you brought it back?

A. Yes, sir.

Q. And you used that, I believe, in towing barge No. 16 up there? A. Yes, sir.

Q. Barge No. 16 had no load on it, did it?

A. No, sir.

Q. Barge 61 did have a load on it, didn't it?

A. Yes, sir.

Q. Both going and coming?

A. Both going and coming, yes, sir.

Q. And what did that load consist of?

A. The pile-driver.

Q. And the donkey-engine?

A. Yes, the donkey-engine and a few spars aboard.

Q. And that same pile-driving outfit was on the barge when you brought it back? A. Yes, sir.

(Testimony of Charles Kruger.)

Q. Do you know whether or not at this time any water was in the hold of the barge?

A. I don't know, for I didn't look at the hold.

Q. Do you know in what condition the pump was on the barge?

A. I don't know anything about the pump on the barge; it was for the men who were on the barge to look after that.

Q. You don't know anything about it, yourself?

A. Yes, sir.

Q. You never made any investigation of it?

A. No, sir.

Q. You say that going up there the members of the crew consisted of yourself and one man?

A. Yes, sir.

Q. That was not the same man that you had on the voyage back, [96] was it? A. No, sir.

Q. How long had you had this man a member of the crew, the man you had on the voyage back?

A. He went down with me to Santa Cruz, and I was down there about fourteen days, running between Santa Cruz and Monterey.

Q. You had this same man at Santa Cruz for fourteen days, did you, prior to the time you came back?

A. Yes; after I took the barge up I went down and ran between Santa Cruz and Monterey.

Q. Is it not a fact you took this man up there one week prior to the time you brought them back?

A. Yes.

Q. And is it not a fact that you had a fight with

(Testimony of Charles Kruger.)

the deck-hand at that time and that it was not the same deck-hand you had at the time you came back?

Mr. LILLICK.—Now, we object to that as immaterial, irrelevant and incompetent. That cannot have anything to do with this matter.

The COURT.—What difference does that make, Mr. Heidelberg?

Mr. HEIDELBERG.—Well, I am simply trying to show the experience of the crew.

The COURT.—Well, I will allow it.

A. That was when I came back from Santa Cruz?

Mr. HEIDELBERG.—Q. Yes, it was when you came back from Santa Cruz, but it was the week prior to the time you brought the men back, wasn't it? A. Yes.

Q. And you did not have the same man coming back that you had the week before you took these men up, did you? A. I don't understand you.

Q. You took all of these pile-drivers up to Point Reyes just one week before the last time you brought them back, didn't you?

A. Maybe so, I can't remember it. [97]

Q. Getting down to dates, you brought them back on June 8, 1923, didn't you?

A. Maybe; I don't know.

Q. If you are told you brought them back on June 8, 1923, then you would say that it was about June 2d that you took them up there, wouldn't you? A. Yes.

Q. And when you took them up you took them up in the "Three Sisters," didn't you? A. Yes.

(Testimony of Charles Kruger.)

Q. As a matter of fact, you took them up there and brought them back at various times on the "Three Sisters," didn't you?

A. I couldn't remember how many times I took them up and brought them back.

Q. Don't you know you did it about three times?

A. Probably.

Q. Did you ever have any conversations with your port engineer as to whether you should take these men up or bring them back? A. No, sir.

Q. How is it you happened to meet those men on the morning of June 2, 1923, and take them up to Point Reyes?

A. The other boat was up there; there was no other boat to take them.

Q. Who gave you instructions to meet these men when you took them up to Point Reyes on or about June 2, 1923?

A. If the "Corona" was not down at the dock I was to take them up.

Q. Then you had a conversation with the port engineer in which he said to you that if the "Corona" was not in San Francisco on or about June 2, 1923, that you were to go there and take these men up to Point Reyes, didn't you?

A. Yes, if the other boat was not there.

Q. And did you have that same conversation with the port engineer at the other times you took these men up? A. No, sir.

Q. Then how did you happen to meet and take them up?

(Testimony of Charles Kruger.)

A. That would depend on what boat was up at Point Reyes, and [98] what other boat was down here, and if I was to bring the men down.

Q. Who told you to meet these men at any time in San Francisco and take them to Point Reyes?

A. I had no such orders.

Q. Then you just met them of your own volition?

A. It depends what boat was in port. If the "Corona" was out I was to take them up.

Q. You were to take them up? A. Yes, sir.

Q. You mean by that that you had orders from the port engineer to take them up?

A. Yes, if the other boat was out.

Q. And so it was at about three different times that you met these men in San Francisco and took them up to Point Reyes? A. Yes.

Q. And you took them on the "Three Sisters"?

A. Yes, sir.

Q. How many times did you bring them back?

A. I can't remember.

Q. Didn't you bring them back twice?

A. Maybe once and maybe twice.

Q. As a matter of fact, didn't you bring them back three times?

A. I cannot say as to that.

Q. Weren't you sent up there at various times by the port engineer to bring these men back on a Saturday?

A. It depends on what boat was in there.

Q. Then you did have your orders at various times from the port engineer of Paladini & Co. to go

(Testimony of Charles Kruger.)

up to Point Reyes and bring these men back to San Francisco?

A. Sure, if the other boat was not there and was away, I was supposed to bring them down.

Q. When you say you were supposed to bring them down, I understand you to mean you had positive instructions from the port engineer of Paladini's to that effect?

A. Yes, if the other boat was out.

Q. What instructions did you have when you left for Point Reyes on [99] or about the 6th day of June, 1923?

A. I had orders to go up and get the pile-driver.

Q. And you also had this standing order, did you not, that at any time the men were to go or were to come, and the "Corona" was not there, you were to bring them back? A. Not that I know of.

Q. That order had never been countermanded, had it? A. Not that I know of.

Q. Then how was it that you went up on the Saturday before to bring these men back?

A. Because the other boat was away.

Q. Then I still say that you had orders from the port engineer, did you not, that if at any time the "Corona" was not in San Francisco and the men wanted to go to Point Reyes, you were to take them on the "Three Sisters"? A. Yes, sir.

Q. And the same way, if at any time you were up at Point Reyes and the "Corona" was not there, and the men were to come back, you were to bring them back? A. Yes, sir.

(Testimony of Charles Kruger.)

Q. So it was that on June 8, 1923, you found yourself at Point Reyes, and these men were finished their work? A. Yes, sir.

Q. And you had this order still in existence that at any time you found yourself at Point Reyes, or found yourself at San Francisco, and the men were to come back or forth, that you were to bring them on the "Three Sisters"?

A. Well, I went up there to get the pile-driver.

Q. And you still had this order in effect, had you not? A. No, sir.

Mr. LILLICK.—I object to that, your Honor; I think the witness has explained the matter.

The COURT.—I think he has made it clear, Mr. Heidelberg. He does not get this question, but he has said that his general orders were to get these men when the other boat was not here.

Mr. HEIDELBERG.—Q. You say you towed salmon barges at [100] various times?

A. Yes, sir.

Q. Outside towing? A. Yes, sir.

Q. And you said you used a swivel at all times you towed outside?

A. No, sir, not all the time.

Q. Didn't you so testify?

A. I didn't give that testimony, no, sir.

Mr. LINGENFELTER.—Do you mean a bridle or a swivel?

Mr. HEIDELBERG.—I mean a swivel. They always use a bridle.

(Testimony of Charles Kruger.)

A. (Continuing.) You always have a swivel on a bridle.

Q. You don't always use what they call a thimble, do you?

A. Yes, you have to have a thimble to put your rope on the bridle; if you don't, the swivel will cut the rope.

Q. You say the swivel will cut the rope?

A. Yes; there has to be a thimble in the shape of a "V" to keep the line in place.

Q. You say there has to be a swivel all the time?

A. A thimble.

Q. Then you say that you did use a swivel all the time when you used a bridle?

A. Yes, if you have a bridle you have to have a swivel.

Q. And you always used that outside? A. Yes.

Q. And you think that is the proper way to tow a barge from Point Reyes to San Francisco?

A. Yes.

Q. That has been your experience? A. Yes.

Q. And that has always been your experience in towing from Point Reyes to San Francisco, has it, you always use a swivel? A. Yes.

Q. When you went up there on the voyage on about May 10, I think it was, you say at that time you were bucking a head sea all the time?

A. Yes, sir.

Q. How much rope did you have out at that time?

A. All the tow-line I had.

Q. All the tow-line you had? A. Yes, sir.

(Testimony of Charles Kruger.)

Q. And you said that was from 450 to 500 feet?

A. Yes. [101]

Q. And that was all the tow-line you had?

A. Yes, sir.

Q. And you testified you had 450 feet of rope out coming back, did you not? A. Yes, sir.

Q. And that was all the rope that you had?

A. We had some more on board, yes.

Q. You had quite a coil above the hatch, didn't you? A. No, sir, not above the hatch.

Q. Where was it on the "Three Sisters"?

A. It goes close to the hatch.

Q. It was coiled around the mast, wasn't it?

A. Yes, sir.

Q. How high was that coil of rope you had?

A. I could not testify how high it was.

Q. As a matter of fact, it was about a foot and a half high by about four feet in circumference, wasn't it?

A. I just want to get this straightened out now; when I first started with the tow I had a 50-foot line out to start with, because the men were aboard the barge; when they told me they were ready on the barge I stopped and backed up and the men came aboard, and then I paid out all the line I had afterwards, and a small coil of rope was left behind there, but I could not tell how much rope it was.

Q. As a matter of fact, you had the body of the rope attached to the mast? A. Yes.

Q. And you had the rest of the rope on the deck?

A. There was not very much rope left.

(Testimony of Charles Kruger.)

Q. Wouldn't you say that the coil that you had there was about a foot and a half high?

A. Where did I say that?

Q. I say, wouldn't you say that?

A. I could not say that, I could not testify to that.

Q. Don't you remember that after Mr. Carlson was injured, they sat him on this coil of rope?

A. Why, certainly they sat [102] him on the coil of rope after we had the tow-line on board.

Q. No; don't you remember, as a matter of fact, that they sat him on this coil of rope that had not been touched?

A. No, sir; it was the tow-line we coiled in.

Q. When did you coil that in—before you took care of Mr. Carlson at all, was it?

A. After we broke the bridle they coiled the rope on top of the hatch, and the men took the injured men and put them on the mattresses that was on top, there.

Q. Is it not a fact that the first thing you did for Carlson was to sit him on the coil of rope, and that the next thing you did was to get the mattresses out and lay him on the mattresses?

A. That is the coil of rope we were towing.

Q. Wasn't it after that that you pulled the rope in from the tow?

A. No, sir; that coil of rope that was on top of the hatch was the one we pulled in.

Q. When you pulled the rope in it had the bridle attached to it? A. Part of the bridle.

(Testimony of Charles Kruger.)

Q. And it had the swivel attached to it, didn't it?

A. Yes.

Q. And you say that at the time you were towing, and at the time this rope snapped, there were about 450 feet of rope out? A. Yes, sir.

Q. How long was the bridle?

A. About 30 feet on both sides; I believe that is what the bridles are.

Q. Then you mean to say that the barge was 475 feet away from the "Three Sisters"?

A. Yes, just about that.

Q. As a matter of fact, wasn't the whole distance and the extreme distance that that barge was ever away from the "Three Sisters," that it did not exceed 200 feet? A. No, sir.

Q. As a matter of fact, didn't you have out about 150 feet of rope and about 25-foot bridle?

A. 150 feet of rope, you say? [103]

Q. Yes. A. No, sir.

Q. You never touched that rope after the first time you passed the bell buoy, did you?

A. Yes, sir.

Q. When was it you touched it again?

A. After we passed the bell buoy I stopped the boat and picked up the men from the barge and got them aboard the "Three Sisters," and then I put the rest of the line I had on board out.

Q. That is just what I asked you. You never touched it after that time, at all, did you?

A. No, sir.

(Testimony of Charles Kruger.)

Q. All the rope that you let out you let out at one time after you passed the bell buoy? A. Yes.

Q. And you never touched it after that, did you?

A. No, sir.

Q. And the same thing about the speed of the engine? A. Yes.

Q. You have no place to look out from that pilot-house, have you?

A. Yes, there is a window in back of the pilot-house right over the galley.

Q. Is there a window in back of the wheel-house?

A. Yes, that is the same thing.

Q. As a matter of fact, are not the windows on the side of the wheel-house?

A. And also on top of the galley. You can see from the pilot-house and from the galley right clean to the stern of the boat.

Q. Did you manipulate this engine at any time, with the exception of the time you went down into the hold and oiled her up?

A. Yes, when I seen we were getting ground swells I slowed down to half speed.

Q. Didn't you go down in the hold and oil the engine? A. Yes.

Q. And didn't you come up and then throw her full speed ahead? A. No, sir.

Q. And didn't you walk back to the men who were playing cards [104] at the back of this boat and say, "What do you think of it now? I have her going full speed"?

A. Not that I can remember.

(Testimony of Charles Kruger.)

Q. Don't you remember saying to Mr. Carlson particularly, "What do you think of this now? I have her going full speed"?

A. I cannot remember, sir. That is over a year ago.

Q. You do remember saying something to Mr. Carlson about full speed, don't you?

A. I could not testify to that.

Q. Did you manipulate this engine as to speed at various times, according to the tow of the barge?

A. I slowed down to half speed, yes.

Q. And you left her going at one steady speed, either full speed or half speed, didn't you?

A. I couldn't run that engine full speed. The engine was only in the boat about two months, and I had orders not to run her full speed—call it three-quarters speed.

Q. What I am asking you is this: You either had the boat going full speed, or three-quarters speed, as you say, or you had it slowed down; in other words, your boat was maintaining a steady speed, whatever it was? A. Yes, sir.

The COURT.—Q. How do you regulate that?

A. From the pilot-house. It runs under governors.

Mr. HEIDELBERG.—Q. And you never slackened or increased the speed of the engine to take up the slack in the tow-rope, did you?

A. No, sir.

Q. You don't do that when you tow, do you?

A. No, sir.

(Testimony of Charles Kruger.)

Q. That is not your practice? A. No, sir.

Q. Your experience does not say that that is necessary? A. No, sir.

Q. When you got through at Point Reyes, who was the first person you spoke to?

A. Mr. Carlson.

Q. Where were you when you spoke to Mr. Carlson? A. Right [105] alongside the barge.

Q. Who was with Mr. Carlson at that time?

A. I could not remember who was with him; the men were with him.

Q. All the men were clustered around Mr. Carlson, were they? A. Yes, sir.

Q. And at that time didn't you holler out to Mr. Carlson, "When are you going to be through over here"?

A. Yes, "When are you going to be through with the pile-driver?"

Q. And didn't you then say to him that you had orders from Paladini to wait and bring them back?

A. No, sir, I cannot testify to that. My orders were to go up and get the pile-driver. That is all I had to do, to bring the pile-driver down. They were supposed to be finished on the dock.

Q. I am not asking you about the pile-driver. I am asking you about a conversation you had with Mr. Carlson. At the time you were standing on board your boat, and at the time that Mr. Carlson and the various other men were alongside, I am asking you if at that time you did not say to Mr. Carlson, at Point Reyes, on or about June 6th, in the

(Testimony of Charles Kruger.)

presence of these other men who were with him at that time, that you had orders from Paladini to wait for them and bring them back? I am asking you for a conversation, and not for orders.

A. As I remember it, I told him I am up to get the barge.

Q. Did you say "barge," and nothing else?

A. I either called it the barge or the pile-driver; the pile-driver was on it; I might have called it the pile-driver.

Q. You didn't say to them that you had orders from Paladini— A. I never did.

Q. Just a minute. I am quoting your exact conversation as it has been reported to me. You did not say to them that you had orders from Paladini to wait and bring them back? [106]

A. I cannot say that I ever had orders from Mr. Paladini, because I got my orders from the port engineer.

The COURT.—Q. He is not asking you that. He says did you tell Carlson that you had orders from Paladini?

A. I told him I had orders to go up and get the barge, yes.

Q. That does not quite answer the question. Did you tell Carlson that you had orders from Paladini to come?

A. I could not remember that, for I got my orders from the port engineer.

Mr. LILLICK.—If your Honor please, by consent of opposing counsel, and if the Court has no

(Testimony of Charles C. Horten.)

objection, we want to withdraw Mr. Kruger and put on a witness who is quite anxious to get away.

The COURT.—Very well.

TESTIMONY OF CHARLES C. HORTEN, FOR PETITIONER.

CHARLES C. HORTEN, called for the petitioner, sworn.

Mr. LILLICK.—Q. Mr. Horten, in 1923, what was your occupation?

A. Vice-president of the Healy-Tibbitts Construction Co.

Q. As such vice-president of the Healy-Tibbitts Construction Co., will you tell the Court what was done about the construction of the pier for the Paladini people up at Point Reyes?

A. We entered into an agreement with the A. Paladini Co. to construct a pier at Point Reyes. The negotiations were made through Mr. Del Savaro.

Q. Who was he?

A. He was the Paladini representative with whom we had all of our dealings up to the time of signing the contract. During the preliminary discussions it was understood that the materials would be transported by the Paladini Company. Our original agreement covered this transportation to be done by the Paladini boats. When the materials were assembled and [107] the piles were in rafts alongside the dock, it was decided it would be best to secure a barge and load all the materials upon

(Testimony of Charles C. Horten.)

a barge, and deliver them to Point Reyes by that method. After a consultation in our office with Mr. Del Savaro it was suggested that we would secure a barge from Crowley, which we did, for the account of Paladini; this barge was loaded with all of the materials and in due time towed by the Paladini Company to the site of the wharf and discharged.

Q. Now, as to the bridle, will you tell us how that bridle was secured?

A. During some of the discussions it was found that there was no bridle with the barge. Mr. Del Savaro came to our office and asked if we had any and we said we did not. It was through that discussion that our man, Mr. Brown, rang up the Crowley Launch & Tow Boat Co. and borrowed one and had it delivered down to the barge for the Paladini Co.

Q. After the venture was ready, what developed about bringing the men back and forth, or taking them up to the job and bringing them back?

A. It was more or less understood that the men would go up on the barge. I recall a conversation with Mr. Carlson in reference to returning to the city during week-ends. During one of those discussions with Mr. Carlson I told him that he could, if necessary, come back overland, by reaching the train at Point Reyes. During none of the discussions was the return of the men upon the completion of the work taken up. We were not thinking of how the men were going to get back, we were thinking of building the wharf at that time. So far as the

(Testimony of Charles C. Horten.)

final return of the men was concerned, there was nothing said.

Q. Who was Mr. Carlson?

A. He was the foreman in charge for Healy-Tibbitts.

Q. He was your foreman on the job? A. Yes.

Q. Was anything agreed upon between A. Paladini, Inc., and the [108] Healy-Tibbitts Construction Co. with reference to taking the men back and forth week-ends?

Mr. HEIDELBERG.—That is objected to as immaterial, irrelevant and incompetent, and as calling for the opinion of the witness.

The COURT.—Objection overruled.

A. There was no discussion with Paladini regarding the return of the men week-ends.

Mr. LILLICK.—Q. What with reference to the men employed by you do you do where the jobs are out of town jobs, where they last for two weeks, or three weeks, or a month?

Mr. HEIDELBERG.—I object to that as immaterial, irrelevant and incompetent.

Mr. LILLICK.—I withdraw the question.

Q. When the job was started, what was the length of time which your contract called for for the completion of the pier in question?

A. I will have to refer to the contract. However, there was a subsequent contract that extended that time; the wharf was extended.

Mr. HEIDELBERG.—I really cannot see the materiality of this.

(Testimony of Charles C. Horten.)

Mr. LILLICK.—Well, if you will agree to stipulate to it, it is our contention, and we think the fact, that the Healy-Tibbitts Construction Co. had their men go up to this job, that they made no agreement whatever with A. Paladini, Inc., and we had no agreement under which we were to bring the men back and forth. If you are willing to stipulate to that, very well; otherwise we will prove it.

A. The original contract provided that the work be finished within 60 working days.

Q. Now, as to the contract with reference to taking your men up to the job and bringing them back, did you have any agreement [109] with A. Paladini, Inc., covering that?

A. There was nothing said regarding the transportation of the men.

The COURT.—Q. How far is Drake's Bay from the station at Point Reyes?

A. It is quite an automobile ride to the station, Judge.

Q. 14 or 15 miles?

A. Yes, I would say so.

Mr. LILLICK.—Q. Do you remember having any conversation with your foreman with reference to the situation if any of the men desired to return to San Francisco for the week-ends during the work there, and how they could get back and forth?

A. That is as I have already testified. I remember telling Mr. Carlson it was possible for him to come overland to the train to Point Reyes and come down by rail.

(Testimony of Charles C. Horten.)

Q. How about his men?

A. That referred to the men, of course.

Mr. LILLICK.—That is all.

Cross-examination.

Mr. HEIDELBERG.—Q. This Del Savaro you speak of is an Italian contractor here in town, isn't he?

A. I only know him as the representative of A. Paladini.

Q. But you do know his business, don't you?

A. Yes, I have seen his card and I know he is a contractor.

Q. And he is the man who asked you to get the bridle for this barge for A. Paladini, Inc.,?

A. Yes.

Q. Do you know a Mr. Carlton? A. No.

Q. Do you know a Mr. Davis who was port engineer for Paladini?

A. No. I know one representative of Paladini, sitting right over there. That is the only man I have met.

Q. You never saw Mr. Davis or Mr. Carlton in regard to the securing of this swivel?

A. Not that I know of.

Q. You never had any conversation with them at all? [110] A. Not that I know of; no.

Q. Do you remember when you told Mr. Carlson that if the men wanted to return to the city they could go overland and take the train back, do you remember that Mr. Carlson said to you at that time

(Testimony of Charles C. Horten.)

that that was 15 or 16 miles over, and they didn't want to do it that way?

A. No, I don't remember that.

Q. When you say there was never any agreement with A. Paladini, Inc., as to bringing the men back, you are only speaking of your own personal knowledge, aren't you?

A. I did the negotiating with Paladini.

Q. As a matter of fact, you don't know anything about what Mr. Martin Brown might have said to Paladini, do you?

A. I don't think he ever met Paladini.

The COURT.—Q. Who is Mr. Brown?

A. He is one of our superintendents.

Mr. HEIDELBERG.—Q. You don't know that of your own knowledge, though, do you?

A. The negotiating was all done in my room, and when Mr. Brown was there I was there.

Q. How long have you known Mr. Del Savaro?

A. Just previous to the date of this agreement; that is the first time I ever saw him.

Q. You say you don't remember having any conversation with Mr. Carlson in which he raised a very strenuous objection to going overland and taking the train back?

A. I really don't recall it; he may have brought the question up, but I really don't recall it.

Q. How were the men to be taken up there, did you say?

A. Well, the men went up on the barge. Our material went along on the barge, and it was neces-

(Testimony of Charles C. Horten.)

sary for some men to go up with the material. I don't know how many went, but I know some of [111] them went up that way, perhaps all of them.

Q. As a matter of fact, don't you know that none of them went up that way? A. No, I don't.

Q. Don't you know that they went up on the "Corona," and that the "Three Sisters" subsequently towed the barge up there? A. No.

Q. You didn't have anything to do with making that arrangement, did you?

A. I guess that was up to Paladini.

Q. All you know is that they were to take the men and the material up there?

Mr. LILLICK.—That is objected to on the ground that that will be covered by the contract. We propose to put the contract in evidence. This last question I submit is objectionable on the ground that it has to do with the contract.

The COURT.—I think the witness previously testified that there was no arrangement for taking the men up there.

Mr. HEIDELBERG.—But he did testify, your Honor, that it was understood that the men were to be taken up there by Paladini at the same time that the materials were taken up there.

The COURT.—Q. Did you testify to that, Mr. Horten?

A. Yes, I think I did, Judge. Here is the situation in reference to the trip up: When we ship material out by barge, we always send some of our own men to look after the stuff, and it was under-

(Testimony of Charles C. Horten.)

stood that a sufficient number of these men would go along with that barge to protect our interests.

Mr. HEIDELBERG.—Q. You left that more or less to Paladini, didn't you?

A. No, that was done to protect the Healy-Tibbitts equipment. That was our idea of having the men go up with the stuff.

Q. It would be news to you to find out that the men did not go up with the equipment at all, but went up on another boat [112] entirely, wouldn't it?

A. Well, they were right in touch with the other boat, though, weren't they?

Q. No, they left about five hours afterwards. That is all.

Redirect Examination

Mr. LILLICK.—Q. You don't know what the men might have done about asking whether they could get a ride on another boat going up there, do you? A. No, sir.

Q. And you had no contract with Paladini by which Paladini was to transport your men up there, had you?

A. There was no understanding at all about the men.

Q. And there was no payment made to Paladini, Inc., to cover taking your men either up or back, or for the week-ends?

A. No, sir, none whatever.

Q. I show you this contract between Paladini & Co., Inc., and the Healy-Tibbitts Construction Co.,

(Testimony of Charles C. Horten.)

and ask you if that is the contract under which this work was done? A. Yes, that is it.

Mr. LILLICK.—We offer this in evidence and ask that it be marked "Petitioner's Exhibit 1."

(The document was here marked "Petitioner's Exhibit 1.")

Recross-examination.

Mr. HEIDELBERG.—Q. You don't know about a conversation that Mr. Carlson had with Martin Brown in which he refused to go up or refused to take his men up that early in the morning the first day the barge went up, do you? You don't know anything about that conversation, do you?

A. No, nothing, whatever.

Q. You would not say that it didn't take place at all, would you? A. No.

Mr. HEIDELBERG.—That is all.

Mr. LILLICK.—Now, just a minute. We move to strike that out, your Honor, because it has nothing to do with the contract, or with what Paladini & Co. might have done in the matter. [113]

The COURT.—But he says he knows nothing about it, Mr. Lillick. It cannot do any harm.

Mr. LILLICK.—Q. Mr. Martin Brown is your foreman?

A. Our superintendent.

Q. Has he any authority to bind Healy-Tibbitts & Co. in a contract of this character?

A. Not in a contract, no, but he could make an arrangement as to how the men should go back and forth; that would be within his duty.

(Testimony of Charles Kruger.)

Q. And pay for it?

A. No, he cannot agree to pay out any money.

TESTIMONY OF CHARLES KRUGER, FOR PETITIONER (RECALLED).

CHARLES KRUGER, cross-examination (resumed).

Mr. HEIDELBERG.—Q. Captain, while we are on this matter of conversation, I will ask you what conversation you had with Mr. Carlson while he was staying in the back of that boat coming from Point Reyes? A. I cannot say.

Q. You had some conversation with him, though, didn't you? A. I don't know.

Q. When was it you told him to stay clear of that line? A. When we first started out.

Q. Was that before or after you went back and cleaned some fish for Mr. Carlson?

A. Cleaned some fish?

Q. Yes. A. I don't remember that.

Q. You don't remember cleaning some fish for Mr. Carlson back there? A. No, sir.

Q. And you don't remember having a conversation with him and showing him how to clean fish, and telling him that you were an expert at it?

A. I don't remember that.

Mr. LILLICK.—What is the materiality of this, Mr. Heidelberg?

Mr. HEIDELBERG.—I am just going to show that he never had any such conversation with him, about keeping clear of any line, [114] and that,

(Testimony of Charles Kruger.)

as a matter of fact, he went back there and sat down with them.

A. (Continuing.) I never sat down with them.

Q. As a matter of fact, you did clean some fish for Mr. Carlson, didn't you? A. I cannot say.

Q. You say you told them to stay clear of that line when you first started out: Is that correct?

A. Yes, sir.

Q. Why did you tell them that?

A. Any man with any common sense would not stay underneath the tow-line.

Q. You were the captain on that boat, weren't you? A. Yes.

Q. And you could tell them to go wherever you pleased, couldn't you? A. Yes.

Q. And you could make them do it, couldn't you?

A. Yes.

Q. But you didn't do it, you let them stay right there?

A. That was their own lookout, not mine. If I tell a man to stay clear of a tow-line he ought to have sense enough to stay clear of it.

Q. And after you told them that you went back and forth and you saw them there several times, didn't you? A. Yes.

Q. You say they did not reply to *them* when you told them to stay clear of that line.

A. No, sir, they did not.

Q. How do you know they heard you when you said that?

(Testimony of Charles Kruger.)

A. I don't know, I couldn't testify to that.

Q. Where were you when you told them that?

A. At the stern.

Q. Where were the other men?

A. The four men were playing cards.

Q. Where were the other men?

A. They were up in front.

Q. Didn't you testify that after you told them that that some of the men went forward and some stayed back there?

A. Yes; they were all over the boat, for that matter.

Q. But didn't you testify on direct examination that the men were all back on the stern part of the boat, and you told them to beware of the line, and that three of them went forward [115] and the rest of them stayed there?

A. Three forward and four aft, and one in the galley shaving.

Q. When did you tell the men to stay clear of the line?

A. When I started out from Port Reyes.

Q. Where were they then?

A. Some aft and some forward.

Q. And you went aft and told the four men back there to stay clear of the line? A. I did.

Q. Did you ever say anything to the other men about staying clear of the line?

A. They all heard me that were back aft.

Q. And nobody made any reply to you?

(Testimony of Charles Kruger.)

A. No.

Q. And it was after that that you went back to the rear of the boat several times? A. Yes.

Q. And you don't remember cleaning any fish for Mr. Carlson and sitting down talking with him?

A. I don't remember that; that was over a year ago, I don't remember that.

Q. You say when you went up you had a heavy sea? A. Yes.

Q. From Pier 46? A. From Pier 23.

Q. You got the barge at 46?

A. I got the barge the day before, yes.

Q. And when you went up there that day, the first time, you say you had a heavy sea?

A. Yes, sir.

Q. And you had all of your rope out at that time? A. Yes.

Q. What difference is there, Captain, in the length of rope that you have out when you are towing in a heavy sea and when you are towing with the sea?

A. I cannot answer that question.

Q. There is no difference at all, is there? As a matter of fact, there is no difference at all? Isn't that true, Captain?

A. Going against the sea, or going with the sea?

Q. Yes.

A. Going with the sea, the towboat will raise with the sea; going ahead, you buck into it.

Q. What difference does that make in the amount of line you [116] have out?

(Testimony of Charles Kruger.)

A. Going ahead, when you are bucking you don't raise with the sea, you just buck right into it.

Q. What difference does that make in the length of line you have out?

A. Because the line is steady all the time when it is going ahead with a strong northwest wind blowing.

Q. Can't you answer my question? Is there any difference, Captain, between the amount of towline that you have out, or must have out, when you are towing against the sea in a heavy sea such as you had on May 10th, or when you are towing with the sea like you had on June 8th; is there any difference in the amount of rope you ought to have out on those two occasions? A. No, sir.

Q. No difference at all? A. No, sir.

Q. That is your experience, is it?

A. Yes, sir.

Q. And you are now giving that as the competent way to tow a boat? A. Yes, sir.

Q. You have said about the loading of equipment, that the bedding was loaded on one side of the vessel. A. Yes.

The COURT.—What significance has that question of the loading?

Mr. HEIDELBERG.—I withdraw that question, your Honor.

The COURT.—I was wondering when Mr. Lillick was putting it in how that contributed one way or another, or had anything to do with the accident. What was your idea about that?

(Testimony of Charles Kruger.)

Mr. LILLICK.—My object in putting that in was to indicate that the men had other places to stand had they cared to have occupied other positions on the boat.

The COURT.—Is there any question about that?

Mr. HEIDELBERG.—Yes, there is a serious question about it.

The COURT.—Wasn't there room forward?

Mr. HEIDELBERG.—There was no room forward. [117]

The COURT.—All right, you may proceed.

Mr. HEIDELBERG.—Q. You have said there was nothing in front of the wheel-house: Is that true? A. Yes.

Q. As a matter of fact, didn't you have three water-casks on the "Three Sisters" at that time?

A. Not that I remember.

Q. Didn't you have three water-casks of about 300 gallons capacity, each, in front of the wheel-house?

A. No, sir. The water-casks were taken off before I started for the tow. I never carried any water-casks forward, the water-casks were carried aft.

Q. So you say that the water-casks were changed, the position was changed, at the time you were at Point Reyes: Is that what you mean?

A. I had no water-casks on board when I went up to get the tow. The "Corona" was carrying the water up to the pile-driver at the time.

(Testimony of Charles Kruger.)

Q. Didn't you carry some water up to the men at the time? A. Before, yes.

Q. But you are sure now that these three water-casks were not in front of the wheel-house on the "Three Sisters" when you came back that day?

A. No, sir, I had no water-casks aboard.

Q. I see some drawing here, I imagine it is a way to get down into the hold of the vessel: Is that correct? A. Yes.

Q. I will label that "X–5," and ask you the name of it.

A. That is the companionway down to the fore-castle.

Q. That takes up how much room?

A. It is about two feet wide; say about four feet square.

Q. And how wide is this boat at this point, X–5?

A. I couldn't tell you that.

Q. Bearing in mind that you have said that the extreme width is 18 feet, don't you remember, even from observation, what [118] width this would be? A. About 8 or 9 feet.

The COURT.—What is the scale of the drawing?

Mr. LINGENFELTER.—One-half inch to the foot.

Mr. HEIDELBERG.—Q. You had a new Diesel engine in the "Three Sisters," didn't you?

A. Yes.

Q. How long had it been in there?

A. About two months.

Q. Was it working fine at that time? A. Yes.

(Testimony of Charles Kruger.)

Q. As a matter of fact, it broke down, didn't it, when you were coming in?

A. Yes; I tried to race the engine, and I pretty near stuck a piston in her.

Q. As a matter of fact, when you went down there were fumes down in the hold, weren't there?

A. No, sir. When I opened up the engine to bring the men in, I ran about two hours; it was this side of Duxbury Reef where the engine stopped on me, and I lost about 15 minutes before I could start it up. There was a tight piston in it.

Q. And there were fumes down in the hold where the engine was located, weren't there?

A. Very little fumes.

Q. Didn't you tell these men who were on board that boat not to go below on account of the fumes?

A. No, sir.

Q. Didn't you tell them that if they did go below for any reason that they were not to smoke while they were there? A. No, sir.

Q. You don't remember having that conversation, either? A. No, sir.

Q. You don't know any of these men particularly, do you? A. No, sir.

Q. Don't you remember speaking to one of them in particular, and telling him—Mr. Trueheart—not to go below, but if he did go below not to smoke, on account of the fumes of the gasoline?

A. Gasoline? [119]

Q. Distillate. A. Distillate?

Q. Well, whatever the propelling power was.

(Testimony of Charles Kruger.)

A. That boat is not burning gas and it is not burning distillate; that boat burns crude oil.

Q. Well, it makes fumes just the same, doesn't it?

A. Not forward, no, because the water-tank is between that and the engine.

Q. As a matter of fact, you were overcome by those fumes on the way in yourself, weren't you?

A. No, sir.

Q. When you said the "Corona" carried passengers, you didn't mean to say that the "Three Sisters" did not carry passengers, did you?

A. I carried passengers in case when the other boat was not up there.

Q. How many men do you say were standing alongside of the wheel-house talking to Anderson, your deck-hand?

A. About three men, I think.

Q. As a matter of fact, only two men were there, weren't there? A. I could not swear to that.

Q. And were not those men on the side of the wheel-house rather than in front of it?

A. On the starboard side, there.

Q. You were not correct when you said they were in front of the wheel-house, there, were you?

The COURT.—I don't think he said that. He said they were on the starboard side of the wheel-house.

Mr. HEIDELBERG.—I also think the record will show that at one time he said they were in front of the wheel-house.

(Testimony of Charles Kruger.)

The COURT.—I know I asked him which side they were on and he said that the luggage was piled on the port side, and that these men were on the starboard side.

Mr. HEIDELBERG.—Q. There were no men in the front of that wheel-house at any time?

A. No, sir. [120]

Q. Do you mean to say, Captain, that that boat was not wet up in the front part of it?

A. No, sir; how could she be?

Q. Do you mean to say there were no sprays whatever coming over? A. How could there?

Q. Answer the question "Yes" or "No."

A. No, sir, no sprays were coming over.

Q. It was absolutely all dry up in front there?

A. Yes, sir.

Q. When you pulled the tow-line in after the accident, part of the bridle was still on it, wasn't it? A. Yes.

Q. And the swivel was still on it? A. Yes.

Q. What did you do with it?

A. They were aboard.

Q. They were aboard the "Three Sisters"?

A. Yes, sir.

Q. Were they aboard the "Three Sisters" the last time you were on board the "Three Sisters"?

A. I could not swear to that.

Q. Did anybody ever take them off to your knowledge? A. Not that I know of.

Q. What did you do with them after the accident?

(Testimony of Charles Kruger.)

A. We kept it aboard for a while, but I could not say what was done with it afterwards. It was probably laid on the dock or thrown overboard, for all I know of.

Q. I think that is probably true, Captain, you did throw it overboard. As a matter of fact, didn't you throw it overboard?

A. Where would I throw it overboard at?

Q. I am asking you if you did not throw it overboard. A. I don't know whether I did or not.

The COURT.—Q. Did you look at the bridle when you hauled it aboard? A. No, Judge.

Q. When your tow broke loose and you pulled your line aboard, did you take a look at the bridle to see what had broken, and how it was broken?

A. No, sir, because I was too excited, and the men were unconscious, and I was just thinking about getting [121] them home.

Q. You raced for port? A. Yes, sir.

Mr. LILLICK.—Q. And over-speeded your engine and stuck a piston because you were in a hurry?

A. Yes. I opened her up at that time to see how fast I could get in, and I had to stop, and she got cool, and I started up again.

Mr. HEIDELBERG.—Q. What was the gross tonnage of the "Three Sisters"?

A. I should judge about 11 tons.

Q. 11 tons net? A. Yes.

Q. What course did you say you were steering coming back? A. East by south, half south.

(Testimony of Charles Kruger.)

Q. Is that true or magnetic? A. Magnetic.

Q. What is the difference between true and magnetic?

A. One is a true course; a magnetic course is what you steer by the chart, magnetic.

Q. This man who was with you, this deck-hand, he was not a licensed man, was he? A. No, sir.

Q. As a matter of fact, was he an able seaman?

A. Yes, sir.

Q. As a matter of fact, Scotty Evans, of the pile-driving crew, steered the boat for you part of the time while you were below, didn't he?

A. Probably he did, I don't remember.

Q. Don't you remember whether or not Scotty Evans steered this boat for you?

A. On the way coming home, you say?

Q. Yes. A. Probably he did.

Q. Don't you remember that he did?

A. I could not swear to that.

Mr. HEIDELBERG.—That is all.

Redirect Examination.

Mr. LILLICK.—Q. One of the questions asked you by Mr. Heidelberg insinuated that you had thrown this bridle overboard in order to lose it so that it might not be brought to light: Do you know anything about any such throwing overboard? [122] A. No, sir.

Mr. LILLICK.—That is all.

The COURT.—We will adjourn now until to-morrow morning at ten o'clock.

(Testimony of Walter G. B. Westman.)

(An adjournment was here taken until to-morrow, Wednesday, August 6, 1924, at ten o'clock A. M.) [123]

Wednesday, August 6, 1924.

TESTIMONY OF WALTER G. B. WESTMAN, FOR PETITIONER.

WALTER G. B. WESTMAN, called for the petitioner, sworn.

Mr. LILLICK.—Q. Mr. Westman, what is your occupation?

A. I am the Crowley Launch & Tugboat superintendent of the shipyard.

Q. And how long have you been such shipyard superintendent? A. For about seven years.

Q. Prior to that time what was your business?

A. Superintendent of operations for the Crowley Launch & Tugboat Company.

Q. As such employee of the Crowley Launch & Tugboat Co., have you a knowledge of the make-up of the bridles used by the Crowley Launch & Tugboat Company? A. I have, yes.

Q. Will you tell us whether they are of different sizes, or whether they are all of the same size?

A. There is very little variation; they are practically all the same size.

Q. What are the lengths and what is the make-up and the dimension of the bridles used by the Crowley Launch & Tugboat Company in towing barges such as barge 61?

(Testimony of Walter G. B. Westman.)

Mr. HEIDELBERG.—That is objected to as immaterial, irrelevant and incompetent, having nothing to do with the issues of this case, because it relates to the towing by Crowley of such barges, and has no particular connection or significance with the towing of this actual barge by A. Paladini, Inc.

The COURT.—Has this witness knowledge of this particular bridle, Mr. Lillick?

Mr. LILLICK.—I am afraid not, your Honor, but I will ask him that question preliminarily. I have not seen the witness as I should, before putting him on the stand; Mr. Lingenfelter [124] obtained him.

Q. Do you know, Mr. Westman, the particular bridle used in this towing job by the "Three Sisters"? A. No, not this particular bridle.

Mr. LILLICK.—Your Honor, my object is to show that bridles of this type, size and character were used by the Crowley Launch & Tugboat Company for towing this particular barge, No. 61, and that they were used for inside and outside towing, and then for the specific purpose of showing that the play in the swivel, which it is said was rusted, which it is claimed by the other side was rusted hard or frozen, would be practically a physical impossibility on account of the play in the thimble. That is all pertinent in this case, for the reason that the bridles used by the Crowley Launch & Tugboat Company were of this type.

The COURT.—I will overrule the objection.

(Testimony of Walter G. B. Westman.)

A. The bridles consist of approximately 35 feet, of about 7/8 wire cable.

Mr. LILLICK.—Q. You mean 35 feet on each side, or do you mean 35 feet in length?

A. 35 feet in length on each side.

Q. That is, from the loop over the bitt to the swivel? A. Yes, sir.

Q. What is that swivel; will you explain to us what the swivel is?

A. The swivel consists of two dropped forgings connected together by a rivet so as to allow the two sections to work either backward or forward, to eliminate the turns from the line or rope.

Q. How much play is there in that swivel?

Mr. HEIDELBERG.—That is objected to again as being immaterial, irrelevant and incompetent, and having nothing to do with this particular swivel which was used on this occasion. [125]

The COURT.—Objection overruled.

A. Usually about a quarter of an inch play.

Mr. LILLICK.—You are acquainted with the size of barge 61? A. I am.

Q. In towing barges of that size, do you, in the towing done by the Crowley people, tow those barges loaded with rock? A. We do.

Q. For that towing do you or do you not use this type of bridle?

A. We use this type of bridle exclusively.

Q. During your experience have you ever known of one of those swivels to be frozen by rust, that is, tight by rust? A. No, I never have.

(Testimony of Walter G. B. Westman.)

Q. Are you able to state whether there are bridles used in this heavy towing that have no swivels?

A. There are.

Q. What is that type of bridle?

A. They splice a round thimble in the end of the rope and then splice the wires direct under these thimbles without any swivel.

Q. The thimble which you mention, does that permit of a rotating such as the swivel would permit of?

A. The manila line has to take care of the rotating in that case.

Q. That is not an answer to my question. I say, does the thimble which you mention permit of rotating such as the swivel would permit of, or is it fast? A. It is fast.

Q. The rope, itself, takes up the turns?

A. The rope, itself, takes up the turns; in other words, it compensates.

Mr. LILLICK.—That is all.

Cross-examination.

Mr. HEIDELBERG.—Q. You say you don't know anything at all of your own knowledge of the particular bridle or swivel that was used in the towing of barge 61 by Paladini on or about May 10, 1923? A. I do not. [126]

Q. You do not know whether it was a ¾ wire bridle or a ⅞, or a ⅝ bridle, do you?

A. I do not.

Q. And you don't know anything about the con-

(Testimony of Walter G. B. Westman.)

dition of this particular swivel or the condition of the wire rope that was attached to that swivel, do you?

A. Other than what ordinarily takes place in other swivels and bridles.

Q. I will ask you the question again. I say you don't know of your own knowledge anything about the specific condition of this particular tackle that was used in towing this barge on that occasion?

A. No, I do not.

Q. When you say that you used a swivel for towing, you have reference to inside towing, haven't you? A. Inside or outside.

Q. Do you mean to say that it is the accepted form of towing in outside work to use a swivel?

A. As far as the Crowley Launch & Tugboat Company is concerned.

Q. What would you say as to the general practice and mode of outside heavy towing, what tackle is used?

Mr. LILLICK.—Now, your Honor, as to that heavy towing, we have a right to have specified either ship towing, which is known as heavy towing, the towing of steamers up and down the coast, or the towing of barges. I think the question is objectionable on that ground.

The COURT.—Perhaps you had better confine it to barges, Mr. Heidelberg.

Mr. HEIDELBERG.—Q. Have you any knowledge of the way barges of this kind are generally towed in outside waters?

(Testimony of Walter G. B. Westman.)

A. They are always towed with a bridle, particularly rudderless barges or square-end barges.

Q. When you say "bridles," you use bridles with thimbles, don't you?

A. We use them with swivels. [127]

Q. You do use them with thimbles?

A. We do not.

Q. But they are used with thimbles, aren't they?

A. They are.

Q. And is not that the accepted way of towing, by others than the Crowley Company?

A. No, not by the Crowley Launch & Tugboat Company.

Q. If a swivel will take turns out of a line, won't it put turns in a line?

A. No, it will not. Water will not run up hill.

Q. Do you mean to say that swivels will not put turns in a rope as well as take them out?

A. It will not put turns in a rope, no.

Q. Won't the simple play of the swivel put turns in a rope?

A. The play in the swivel is there for the purpose of eliminating any turns in the rope.

Q. Is it not a fact that swivels are used by longshoremen in lifting perpendicular weights to keep the weight from swinging? A. Absolutely.

Q. And is it not true that it loses its force and effect when used for straight towing? A. No.

Q. What proportion of outside towing does the Crowley Company do as compared with inside towing? A. Probably about 5 per cent.

(Testimony of Walter G. B. Westman.)

Q. You were not consulted about the securing of this bridle by the Healy-Tibbitts Construction Co., or by Paladini, were you? A. No.

Redirect Examination.

Mr. LILLICK.—Q. From your position with Crowley's, and from your general experience on the bay, are you able to state, in terms of general approximation, the percentage of towage done on San Francisco Bay and out of the bay of barges of the character of barge 61 as compared with the total towing done by all of the other concerns operating on San Francisco Bay? [128]

Mr. HEIDELBERG.—That is objected to as being immaterial, irrelevant and incompetent, and having nothing to do with the case.

The COURT.—Objection overruled.

A. No; that is rather a large question to answer, Mr. Lillick.

Mr. LILLICK.—Q. I asked you to state approximately. Will you give us your best judgment about it?

A. The ratio of barges towed inside as against the barges towed outside?

Q. The ratio of barge towing by the Crowley Launch & Tugboat Company in comparison with all of the other towing done by all of the other concerns operating on San Francisco Bay.

Mr. HEIDELBERG.—That is objected to also unless it is limited to outside towing.

Mr. LILLICK.—I am asking this, your Honor,

(Testimony of Walter G. B. Westman.)

to meet the questions asked by counsel on the other side.

The COURT.—I understand it. I will overrule the objection.

A. Do you mean in percentage?

Mr. LILLICK.—Q. In a general way, say within 10 per cent. I do not mean with any definite accuracy, I mean within a percentage of either 10 per cent either way.

A. I would say that we do practically one-third of the outside towing, as compared with the others.

Q. How many barges does Crowley operate?

A. Approximately about 20.

Q. What was your position with the Crowley Launch & Tugboat Company in June, 1923?

A. Shipyard superintendent.

Q. As such shipyard superintendent, had you anything to do with the inspection of the bridles used by the company at that time? A. No—

Mr. HEIDELBERG.—Just a moment. That is objected to, your Honor, as immaterial, irrelevant and incompetent. [129]

The COURT.—He answered it "No."

Mr. HEIDELBERG.—Then I move to strike out the answer.

Mr. LILLICK.—It may go out.

Mr. HEIDELBERG.—I just want to keep the record straight, your Honor.

The COURT.—Very well.

Mr. LILLICK.—Q. Do you know whether or not the Crowley Launch & Tugboat Company in

(Testimony of Walter G. B. Westman.)

June, 1923, had a bridle in its ownership made of 5/8-inch wire? A. I think not.

Q. What was the size of the bridle used by the Crowley Launch & Tugboat Company at that time?

A. The smallest were 3/4 and the largest 7/8.

Recross-examination.

Mr. HEIDELBERG.—Q. You have never seen this broken bridle, have you, since this accident?

A. I have already answered that question.

The COURT.—He said he knew nothing about that at all.

Mr. HEIDELBERG.—Q. I mean since the accident you have never seen it?

A. I have never seen it.

TESTIMONY OF WILLIAM FIGARI, FOR PETITIONER.

WILLIAM FIGARI, called for the petitioner, sworn.

Mr. LILLICK.—Q. In May of 1923 what was your position with the Crowley Launch & Tugboat Company?

A. General superintendent of operations.

Q. Will you tell us whether during that month any application was made to you for a towing bridle? A. Yes, sir.

Mr. HEIDELBERG.—Now, just a moment. That is objected to, may it please your Honor, as immaterial, irrelevant and incompetent, unless it is specified who it was made by, and that it [130] has application to this particular case.

(Testimony of William Figari.)

Mr. LILLICK.—We propose to prove by this witness, if your Honor please, that in May, 1923, Brown, the superintendent of construction of the Healy-Tibbitts Construction Co., telephoned and asked for a bridle, that this witness picked out that bridle, that this witness thereafter sent the bridle out, and that it was of a definite size.

Mr. HEIDELBERG.—I have no objection to that question if you ask him if Mr. Brown of the Healy-Tibbitts Co. did it. You cannot ask him if anyone did it.

Mr. LILLICK.—That is just what my question asked him.

The COURT.—Objection overruled.

A. Yes. Mr. Brown asked me for a bridle. I told him I didn't have any, that I would have to take one off the boats. He said he wanted a bridle to take a barge, barge 61. He said it would help him out very much if he could get one. I took one off one of the boats, one of our large boats.

Mr. LILLICK.—Q. What kind of a bridle was it? A. It was a wire bridle.

Q. What is the size of the wire?

A. Well, I could not say; we use 5/8, 7/8 and 3/4; it was either 7/8 or 3/4. I could not say what was the size of it—I could not say exactly.

Mr. LILLICK.—Mr. Reporter, will you read that answer back to the witness.

(Answer read by the reporter.)

Q. You notice, Mr. Figari, you said 5/8.

(Testimony of William Figari.)

A. I don't mean 5/8, I didn't mean that, I meant 7/8 or 3/4.

Mr. LILLICK.—Your Honor will notice that the witness said 5/8, and I think said it inadvertently.

The COURT.—Yes. I understood him. [131]

Q. You use 7/8 and 3/4? A. Yes.

Q. Steel cable?

A. Yes, made by Waterbury, as all our bridles are.

Mr. LILLICK.—Q. What is the material from which the swivel is made?

A. It is a steel swivel.

Q. Do you know what the play in that swivel was, the distance between the portion of the swivel that ran in the center portion of the surrounding part of it—I don't know the technical term for it.

Mr. HEIDELBERG.—That is objected to as being immaterial, irrelevant and incompetent, unless it is connected up with this particular swivel.

The COURT.—That is the one he was asking about.

Mr. LILLICK.—I am asking him about that one.

The COURT.—Q. You gave Brown a bridle, did you? A. Yes, sir.

Q. It had a swivel on it?

A. It had a swivel on it.

Q. What was the play of the swivel of the bridle you gave to Mr. Brown?

A. I do not know the exact play. They wear pretty well, you know, from constant towing.

(Testimony of William Figari.)

Q. Was the swivel allowed only a certain play, or did it make a complete revolution?

A. I should imagine it was probably about a quarter of an inch play in the swivel, more or less.

Q. It was not a completely free swivel?

A. It was free, yes, sir.

Q. Could it play clear around?

A. Oh, yes, it could play clear around. It has to take the turns out of the line. The boat was using it all the time; I took it out of a boat that was using it.

Q. What do you mean by a play of a quarter of an inch?

A. That is the pin that goes through the two eyes; there are two eyes, and there is a pin that goes through; it is riveted [132] on each end.

Mr. LILLICK.—Q. The swivel is practically a riveted wire in a socket, isn't it? A. Yes.

Q. And in speaking of play, you mean the turn between the rivet, itself, and the wires of steel surrounding it: Is that correct? A. Yes, sir.

Q. Did you examine this particular swivel?

A. No, I didn't examine the swivel; I just took it off the boat that was using it and put it on the dock, and I think the Healy-Tibbitts truck came down and took it away; I am not sure whether I delivered it or whether the Healy-Tibbitts truck took it away.

Q. Do you know whether or not it was in good condition?

(Testimony of William Figari.)

A. It was in good condition. It was used on the boat for towing the same identical barges that we rented to Healy-Tibbitts.

Q. Who inspects your equipment?

A. The captains of the tugs inspect their own equipment.

Cross-examination.

Mr. HEIDELBERG.—Q. You don't know anything now of your own knowledge about this particular swivel that you let Brown have, do you?

A. No. The only thing I know is that it was used on the boat.

Q. And you have never seen that swivel since, have you? A. I have not seen it since.

Q. So you have no way at this time of positively identifying that particular swivel in your mind as compared with the rest of the swivels or bridles that Crowley now has? A. No.

Q. And you did not do anything to that swivel before you put it on the dock or before it was delivered to the barge, did you?

A. I got the captain of our tug to take if off his boat, cut the manila line out and just throw the bridle on the dock. [133]

Q. You didn't touch that bridle, at all, yourself, you had the captain throw it on the dock?

A. I told him to take it off. I just looked at it. I told him to cut the line and put it on the dock.

Q. But you would not say now whether it was

(Testimony of William Figari.)

a three-quarters or a seven-eighths wire attached to it, would you?

A. No. We used to use three-quarters all the time, but we are getting bigger boats and using larger wire.

Q. You were not told for what purpose this bridle and swivel were to be used, were you?

A. Yes, he told me he wanted to tow a barge up to Point Reyes.

Q. You say now you were told the purpose?

A. He told me he wanted to tow a barge, and I heard it was going to Point Reyes, and I supposed that was what he was going to use it for.

Q. You had a conversation with me, did you not, in the office of the Crowley Launch & Tugboat Co., in the presence of Mr. Carlson, on Monday afternoon? A. Yes, sir.

Q. Didn't you tell me at that time and at that place, in the presence of Mr. Carlson, that you did not know what he wanted that bridle for?

A. No, I don't think I said that.

Q. You don't remember saying that to me?

A. No.

Q. Don't you remember having a prior conversation with Mr. Carlson some three or four months ago at the Crowley Launch & Tugboat Co. and at that particular time you said to him, in substance and effect, that you did not know what they wanted this bridle and swivel for. Don't you remember having that conversation?

A. No.

(Testimony of William Figari.)

Q. Don't you remember further saying to him at that particular time and place that if you had known what they wanted it for you would not have let them have it? A. No.

Q. Don't you remember having a talk with Captain Fogel about [134] three months ago in the office of the Launch Company about this bridle?

A. Yes.

Q. Didn't you say to Captain Fogel at that time, if you knew what they wanted the bridle for you would not let them have it?

A. No, I did not, because I knew what they wanted it for.

Q. And you now say again that you did not tell me last Monday afternoon, in the office of the Crowley Launch & Tugboat Company, in the presence of Mr. Carlson, that you did not know what they wanted this for? A. I did not.

Redirect Examination.

Mr. LILLICK.—Q. On this question of the claim that you told someone that you would not have let them have this bridle if you had known what they were going to use it for, were bridles of similar sizes used by the Crowley Launch & Tugboat Co. at that time for towing this barge 61?

A. Yes, sir.

Mr. HEIDELBERG.—That is objected to as being immaterial, irrelevant and incompetent. The witness has already testified he did not know.

Mr. LILLICK.—If your Honor please, we have had thrown out an insinuation in this case that

(Testimony of William Figari.)

we threw away a bridle; now we have it that this witness is accused of having said in the presence of someone else—and I suppose they will put that person on to testify—that he would not have let them use this bridle. Is it not competent to show that at that time—

The COURT.—I understand the situation, Mr. Lillick; the objection is overruled.

Mr. LILLICK.—Q. Will you answer the question, now please? A. I answered it yes.

Q. Do you mean outside the Heads?

A. We don't do any outside towing; most all our towing is in the bay. We have towed a [135] barge like that up to Point Reyes, and we used the same kind of a bridle. We do very little outside towing. If we do go outside it may be just outside the Gate; we might have a barge of rubbish, or something like that to tow out. We do very little outside towing, it is all in the bay.

Q. Referring to these conversations that it is said you had with these other gentlemen, will you tell me, as you best remember it, what was said by them and what was said by you about this bridle; what did they say to you?

The COURT.—I think that is more properly rebuttal, Mr. Lillick, isn't it, because a mere question being asked is not evidence.

Mr. LILLICK.—Certainly not, your Honor. Then I will withdraw the question for the time being.

(Testimony of William Figari.)

Recross-examination.

Mr. HEIDELBERG.—Q. It is a fact, is it not, that when the Crowley Launch & Tugboat Co. does do outside towing they only go a short distance outside the Heads? A. Yes.

Q. And when they do they use a 7/8-inch bridle: Isn't that true?

A. We use 7/8-inch bridle. We don't go very far out. On one occasion we towed the same identical barge up to Drake's Bay for a boiler. That was about the only time I remember we went a long distance towing a barge outside. We do very little outside towing.

Q. Now, this conversation that you had with Martin Brown, did that take place personally, or was it over the telephone?

A. Personally. I was up at Pier 46 at the time.

Q. And it took place in person?

A. Yes, in person.

Q. Didn't you tell me Monday, in the presence of Mr. Carlson, that he telephoned down to you?

A. No. I was up at 46. I was [136] sent up to 46 to look at the barge, and when I was there Martin Brown asked me for a bridle.

TESTIMONY OF HARRY B. ANDERSON, FOR PETITIONER.

HARRY B. ANDERSON, called for the petitioner, sworn.

Mr. LILLICK.—During yesterday's session, your

(Testimony of Harry B. Anderson.)

Honor, we were asked for the license of Charles Kruger. We have the license here. This is the license, however, under which Kruger now operates, and I would like to substitute for the license, itself, a copy, if it is to be introduced in evidence.

Mr. HEIDELBERG.—You made the copy, did you?

Mr. LILLICK.—No, I did not, but I am told by Mr. Lingenfelter that it is a copy. I am simply producing it now in response to the demand made for it by opposing counsel yesterday.

Q. Mr. Anderson, in June of 1923 what position did you occupy with the "Three Sisters"?

A. A deck-hand.

Q. Do you remember going to Drake's Bay to get a pile-driver? A. Yes, I do.

Q. When you arrived at Drake's Bay, do you remember whether it was in the afternoon or in the morning?

A. I should judge it would be in the afternoon some time.

Q. Who was in command of the "Three Sisters"? A. Captain Kruger.

Q. When you arrived at Drake's Bay what did you find as to the situation with reference to bringing the pile-driver back?

A. They had not finished the work up there.

Q. What did you and Kruger do until they finished the work?

A. We laid alongside the fish barge.

(Testimony of Harry B. Anderson.)

Q. And when they finished the work, what did you do?

A. We came back to take the driver.

Q. When you came back to take the driver, who affixed the bridle?

A. The pile-driver crew. [137]

Q. And after you started towing, were the men on the pile-driver, or were they on the "Three Sisters"? A. They were on the driver.

Q. How long, approximately, was the hawser between the "Three Sisters" and the pile-driver when you started to tow? A. 50 or 75 feet.

The COURT.—Let me ask a question here.

Q. You first attached a line and walked off from the dock, didn't you? Didn't you attach a single line and walk the barge away from the wharf?

A. We let go altogether, and we just turned her right around with the short line.

Q. Then when the bridle and the line were fixed for the final tow—Drake's Bay is an open roadstead, isn't it? A. Yes, sir.

Q. Then who fixed the bridle on to the barge?

A. The pile-driver crew put it on the bitts.

Q. And that is all they had to do, was it, just to put the loops over the bitts?

A. Yes, to put the loops over the bitts.

Mr. LILLICK.—Q. At that time did you notice whether the swivel was turning freely in its socket?

A. No, I didn't notice the swivel at all.

Q. After you started back, how long was it before the hawser was lengthened?

(Testimony of Harry B. Anderson.)

A. I should judge we went about fifteen minutes or half an hour.

Q. About where were you when that was done?

A. I should think it would be right abreast of the bell buoy.

Q. After you had lengthened the hawser, what did the men on the driver do, either before or after?

A. We did not lengthen the hawser then. We backed up and we took the men aboard, and then we lengthened the hawser.

Q. After having backed up and taken the men aboard, how long did you make the hawser, what was the length of the hawser? [138]

A. We let her run to about full length.

Q. How far in feet would you say that was?

A. I should judge it would be about 400 feet.

Q. How did it happen that you went back to take the men off the pile-driver?

A. I guess that was understood, that we would take them aboard.

Q. Understood by whom and in what way?

A. The pile-driver crew, that is, the pile-driver foreman, because he was aboard the "Three Sisters."

Q. Did you hear any conversation about that?

A. No, I didn't.

Q. Do you mean that the foreman of the pile-driving crew was on board the "Three Sisters" while you were making the tow to the bell buoy?

(Testimony of Harry B. Anderson.)

A. He was on the "Three Sisters" while we were making the tow out to the bell buoy.

Q. And the other men were then on the pile-driver? A. On the pile-driver.

Q. After they came on board and you started to make the tow, what position did you take on the "Three Sisters"? A. I took the wheel.

Q. How long did you remain at the wheel?

A. Almost an hour.

Q. Did you remain at the wheel up to the time of the accident?

A. I remained at the wheel up to the time of the accident.

Q. You were still at the wheel when the accident occurred?

A. I was at the wheel when the accident occurred.

Q. Did you see the bridle break?

A. No, I didn't.

Q. Where were the men on the "Three Sisters" at the time the bridle broke? Will you locate each man that was on the "Three Sisters," including Kruger, and the positions that they occupied when the bridle broke?

A. Four of them were aft, playing cards, on the starboard side by the bitts; there were [139] two of them talking to me into the wheel-house that is, they were talking into the wheel-house to me; one of them was shaving in the galley.

Q. That is seven in all.

A. I believe it is, yes.

(Testimony of Harry B. Anderson.)

Q. As you were coming out from the buoy, was there any water breaking over your bow?

A. There couldn't have been.

Q. Why not?

A. Because we were running with the sea. We were taking it on the starboard quarter.

Q. How about the man who was standing just out of the pilot-house, in front of you, if there had been water breaking over would it have struck them?

A. I say it couldn't because we were coming with it.

Q. But I say if there had been, would they have been wet by it? A. They would have been wet.

Q. Did you hear any conversation at all between Captain Kruger and the men on the pile-driver as they came aboard, with reference to a safe place on the "Three Sisters"? A. No, I didn't.

Q. Where were you at the time the men came aboard?

A. I believe I had already taken the wheel.

Q. Had the captain been at the wheel at any time? A. Yes, he had.

Q. Where was the equipment that was put on the "Three Sisters" first?

A. Most of it was on the port side.

The COURT.—Is that disputed at all, that is, the fixing of these goods by Captain Kruger?

Mr. LILLICK.—I am not sure about it, your Honor. I don't know whether the other side is going to make any point about that, or not.

(Testimony of Harry B. Anderson.)

Mr. HEIDELBERG.—I think that has been pretty well accounted for. [140]

Mr. LILLICK.—Very well, then, I will not cover the same point twice.

Q. Where was Kruger at the time of the breaking of the line?

A. On the port side of the wheel-house.

Q. In any particular position with reference to the lever or control to the engines?

A. Yes, right in front of it—right aft of it, rather.

Q. Do you know whether he used it?

A. He stopped down as soon as she snapped.

Q. What speed were you running after you left the bell buoy, at what speed were you running?

A. He slowed down, but I cannot say what speed he was going. I know he slowed down. I am not familiar with the engine, so I couldn't say.

Cross-examination.

Mr. HEIDELBERG.—Q. Mr. Anderson, are you an able seaman? A. Yes, sir.

Q. Have you got your papers? A. Yes, sir.

Q. Will you let me see them? A. Yes.

Mr. LILLICK.—I think it is not necessary to have an able seaman on such a launch, your Honor.

The COURT.—Well, if he has them, that ends it.

Mr. HEIDELBERG.—Q. You say the men were on the pile-driver at the start? A. They were.

Q. When you say that, you don't mean all the men of the pile-driving crew were on there, do you?

(Testimony of Harry B. Anderson.)

A. No. The foreman and the cook were aboard the "Three Sisters."

Q. And they were aboard the "Three Sisters" from the very beginning of that voyage, were they not? A. From leaving the dock.

Q. At no time were they aboard the barge?

A. No, they were not. [141]

Q. Is it not a fact that the men were aboard the barge because they were putting the bridle over the bitts; isn't that one of the things they were doing?

A. It is one of the things they were doing.

Q. And another thing they were doing was lifting the anchor? A. Yes.

Q. And that is the reason why the men were on board the barge, wasn't it?

A. Not alone that; they were making things secure, which they had to do.

Q. In other words, they were preparing the barge so that the "Three Sisters" could tow it away from there? A. In their line of duty.

Q. Would you say that it was in their line of duty to attach the swivel and the bridle to the bitts, or would that be the duty of the crew of the boat?

Mr. LILLICK.—That is objectionable, your Honor, because it is purely the conclusion of the witness.

The COURT.—Well, let him answer it.

A. Anybody could have done that; they were just handy at the time.

Mr. HEIDELBERG.—Q. You are an able seaman, aren't you? A. Yes.

(Testimony of Harry B. Anderson.)

Q. Is it not the duty of the members of the crew of a towboat to see that their tow, as far as the anchor and as far as the attachment of the bridle are concerned, isn't it their duty to perform that work?

Mr. LILLICK.—We object to that on the ground that it calls for the conclusion of the witness, and perhaps it is not particularly material.

The COURT.—Let him state his conclusion.

A. Well, on big ships, the towboat usually gave us a line and [142] the crew of the boat made the bridle fast.

Mr. HEIDELBERG.—Q. In regard to this particular tow here, don't you think it was your duty to have seen that that anchor was lifted?

Mr. LILLICK.—Now, your Honor, that certainly is objectionable.

Mr. HEIDELBERG.—All right, we withdraw the question.

The COURT.—Yes; the general custom might be of some value.

Mr. HEIDELBERG.—Q. You say you let the rope out to the full length about the time you passed the bell buoy.

A. About the time we passed the bell buoy, yes.

Q. And the captain never altered that rope in any way after that time and up to the accident, did he? A. No.

Q. You said that the length of that rope when it was out full length was about 400 feet?

A. About 400 feet.

(Testimony of Harry B. Anderson.)

Q. And all the rope was out?

A. Well, there may have been, say, about 18 feet on the deck.

Q. You would not say there was any more than that on the deck, would you? A. No, I would not.

Q. Then you would say that the full length of that rope was about 418 feet?

A. Something like that.

Q. Not to exceed 425 feet at the most? A. No.

Q. You say you were at the wheel of the "Three Sisters" for quite a while.

A. When the accident happened.

Q. And you had been there for about an hour previous to that time? A. Yes.

Q. Do you remember whether or not Scotty Evans was at the wheel of the "Three Sisters"?

A. He was.

Q. He was. Your memory is better than the captain's.

Mr. LILLICK.—What is that? [143]

Mr. HEIDELBERG.—His memory is better than the captain's on that.

Mr. LILLICK.—What does the captain say? Just for my information, what did he say?

Mr. HEIDELBERG.—He didn't remember it; he doubted it.

Mr. LILLICK.—I think that remarks of that kind in this court, may it please your Honor, are out of order.

The COURT.—Well, it won't do any harm; I am

(Testimony of Harry B. Anderson.)

not going to decide this case on the remarks of counsel.

Mr. HEIDELBERG.—Counsel asked for it. Of course, if the case was before a jury it might not have been proper, but under the circumstances I think it is all right.

Q. When the captain was below, you were at the wheel, were you not? A. Yes.

Q. And there was no other member of this crew?

A. Just the captain and myself.

Q. In order to see that tow, you would have to look out the side windows of that steering-house, wouldn't you?

A. Not the side windows, right aft; there was a window right on top of the galley, several small windows, which you could look out.

Q. And you were alone in the wheel-house all of that time? A. Most of that time, yes.

The COURT.—Q. How long have you been an A. B.?

A. I started to sea when I was 15 years of age and I am 22 now. I have been on transports, and oil tankers, and gasoline schooners.

Q. And you took your turn at the wheel?

A. Yes; I have been a quartermaster on the "Madrona" and I have been a quartermaster on the "Nevada."

The COURT.—Is Captain Kruger still here? [144]

Mr. HEIDELBERG.—Yes, your Honor, he is in the courtroom now.

(Testimony of Charles Kruger.)

The COURT.—I would like to ask him a question.

Mr. LILLICK.—Will you take the stand, Captain Kruger?

TESTIMONY OF CHARLES KRUGER, FOR PETITIONER (RECALLED).

CHARLES KRUGER, recalled for petitioner.

The COURT.—Q. Captain, what was your course coming down? A. East by south, half south.

Q. And what directions were these swells?

A. We call them westerly swells.

Q. How would they catch you?

A. About on the quarter.

Mr. LILLICK.—If your Honor please, it has been inconvenient to bring here one of our witnesses, a Mr. Brown, and, his testimony being short in any event, counsel upon the other side have been good enough to stipulate that were he in court he would testify as follows—

Mr. HEIDELBERG.—I wish you would read that now. I think it is all right, but, owing to the testimony of Mr. Figari about the telephoning and one thing and another like that, I don't know but what Mr. Brown ought to be here.

Mr. LILLICK.—Very well, I will bring him out here.

Mr. LINGENFELTER.—Martin Brown is engaged in building a water conduit down at Dumbarton. We are holding up Hetch Hetchy, your Honor, if we have to bring him up here.

(Testimony of Charles Kruger.)

Mr. LILLICK.—I am relying upon the stipulation counsel said he would make with me.

Mr. HEIDELBERG.—What is it?

Mr. LILLICK.—(Reading.) "I am superintendent of construction for Healy-Tibbitts Construction Co., and was engaged in [145] that capacity in the month of May, 1923. During the early part of that month I was asked by Mr. Horten, of our company, to secure a bridle for Crowley's barge No. 61 from the Crowley Launch & Tugboat Company. I telephoned William Figari of Crowley's and he told me he would get a bridle. My recollection is that Mr. Figari either brought this bridle down to the barge at Pier No. 46 or sent it down, at any rate I am sure that the bridle was delivered aboard the barge at Pier No. 46."

Mr. HEIDELBERG.—It is so stipulated.

TESTIMONY OF ORVILLE DAVIS, FOR PETITIONER.

ORVILLE DAVIS, called for the petitioner, sworn.

Mr. LILLICK.—Q. Mr. Davis, what is your present occupation?

A. Port engineer for the Paladini Fish Company.

Q. How long have you been such port engineer?

A. Since some time in June.

Q. Of what year? A. 1923.

Q. To refresh your recollection, Mr. Davis, you took Mr. Carlton's place between the 10th of May and the 10th of June, 1923, did you not?

(Testimony of Orville Davis.)

A. Yes, sir.

Q. Prior to your taking the position of port engineer for A. Paladini, Inc., what was your occupation?

A. Guarantee engineer for Fairbanks Morse.

Q. What period of time had you been such?

A. About nine months.

Q. Had you just prior to this at any time been on the "Corona"? A. Yes, sir.

Q. In what position? A. Chief engineer.

Q. During that time did you run at all to Drake's Bay? A. One trip, I believe.

Q. And that was while they were working upon this pier? A. They had not started yet. [146]

Q. Will you give us in a general way your experience as an engineer, and how long you have had a license, and, in a general way, your qualifications as an engineer?

A. Well, I have been around boats and engines since I was about—well, as far back as I can remember. I served my time as a machinist. I worked on various boats. I was ten years as engineer and pilot on the Mississippi, that is, off and on.

Mr. LILLICK.—We offer in evidence, if your Honor please, subject to our withdrawal afterwards, the licenses held by Mr. Davis from time to time, in ocean-going vessels, as well as an engineer of vessels propelled by gas, naptha, etc. We will substitute for the originals copies so that they may be put in the record.

(Testimony of Orville Davis.)

Mr. LINGENFELTER.—I have copies here, Mr. Lillick.

Mr. LILLICK.—I understand there will be no objection by counsel on the other side to our substituting copies for the originals.

Mr. HEIDELBERG.—No.

Mr. LILLICK.—I will let Mr. Bell examine these copies and compare them with the originals.

Q. Who employed you as a port engineer for Paladini? A. A. Paladini.

Q. After having been employed as such, what were your duties?

A. The care and maintenance of the boats and the equipment.

Q. With reference to repairs that might be needed upon any of the boats, what did you do?

A. I went ahead and done them or had them done.

Q. Had Mr. Paladini anything to do with them?

A. No, sir.

Q. Did Mr. Paladini have anything to do with the actual management of the vessels in so far as their operation was concerned? [147]

A. Nothing.

Q. Did he inspect the vessels, himself?

A. Not that I know of.

Q. What happened if, for example, one of the vessels needed repairs in her engine-room, what did you do?

A. Made arrangements to have them done, or done them myself.

Q. Whose discretion was used as to that?

(Testimony of Orville Davis.)

A. Mine.

Q. Did you have anyone over you in any way, Mr. Davis? A. No one.

Q. Just prior to the bringing back of the pile-driver from Point Reyes, will you tell us what you did about preparing for the work?

A. I got things ready.

Q. By saying you got things ready, what do you mean, what did you do? A. The tow-line.

Q. Did you personally get that tow-line ready?

A. I did.

Q. What did you do about getting it ready?

A. It was coiled up on the dock and I ran the coil out on the floor toward the door alongside the boat.

Q. What dock was that? A. Pier 23.

Q. Approximately how many feet long was that hawser? A. Between 500 and 600 feet.

Q. What was its size? A. 7-inch.

Q. What did you do about getting a bridle for the tow? A. The bridle was there.

Q. The bridle was there? A. Yes.

Q. What kind of a bridle was it?

A. About a 7/8 steel cable bridle.

Q. How long?

A. Possibly 70 or 75 feet spread.

Q. What was its condition? A. Good.

The COURT.—Did you examine the swivel?

A. Yes, sir, that is a part of my duty.

Q. Was the swivel freely moved?

A. Yes, sir. [148]

(Testimony of Orville Davis.)

Q. It was not frozen in any way?

A. No, sir; if it was I would have noticed it.

Mr. LILLICK.—Q. What was the play in the swivel, in the rivet—do you know? A. I do not.

Q. Do you of your own knowledge know whether it was turning in the shackle?

A. I am sure that it was.

Q. Prior to the "Three Sisters" leaving on that voyage, what, if anything, did you do about inspecting her and her machinery?

A. I always inspect all the boats before they go out on a trip.

Q. Did you inspect her at this time?

A. I am sure I did.

Q. What was her condition? A. First class.

Q. Are you speaking of her generally? Speak of her engines, and then her hull.

A. She had a new engine, in good shape.

Q. How old?

A. Possibly two months or two and a half months, I don't remember the exact age.

Q. What was her horsepower?

A. 135.

Q. What was the size of the tug?

A. Nearly 60 feet in length and about 17 feet beam.

Q. Whereabouts is the "Three Sisters" now?

A. Out at sea.

Q. When will she be in again? A. To-night.

Mr. LILLICK.—Your Honor, I wonder if we

(Testimony of Orville Davis.)

could arrange to go down there to-morrow morning?

Q. Mr. Davis, how long would it take us to go to where she will be stationed?

A. She will be at Pier 23.

Q. And where is Pier 23?

A. North of the Ferry about a quarter of a mile.

Mr. LILLICK.—I wonder if we cannot arrange that? Would you be willing to have counsel and the Court go down? Would the Court be willing? It would take half an hour, perhaps.

The COURT.—Yes, I will go.

Mr. LILLICK.—Thank you, your Honor. We might arrange the [149] time right now, a time suitable to your Honor, such time as you would fix. The importance of it will be to see the deck. I think that will tell the story.

The COURT.—We will leave here at ten o'clock in the morning, say. Do you think you will finish all the testimony to-day?

Mr. HEIDELBERG.—I certainly hope so, your Honor. I will do everything in my power to finish it to-day.

Mr. LILLICK.—I think we will finish our side very easily. This is practically the last witness we have.

The WITNESS.—Your Honor, may I say a word?

The COURT.—Certainly.

The WITNESS.—I don't know whether I can ar-

(Testimony of Orville Davis.)

range to have her in at ten o'clock to-morrow morning.

Mr. LILLICK.—If she will be in to-night, Mr. Davis, she will have to be held here until to-morrow morning. We will have to make those arrangements.

The COURT.—Q. Is she out fishing? A. Yes.

Q. Is there some other time that would be a more convenient time?

A. She is out on the run every day, your Honor, and we only have two boats now.

Mr. LILLICK.—Well, your Honor, this is a very laudable interest that Mr. Davis has in the business, but I think that we can arrange some other means, even if we have to hire another boat, if necessary.

The COURT.—Q. What time does she come in to-day? A. Between 3:00 and 5:00 o'clock.

Q. You mean in the afternoon? A. Yes.

The COURT.—Couldn't we go this afternoon?

Mr. LILLICK.—I would like very much to go this afternoon, your Honor.

The COURT.—I would just as soon go this afternoon. We will [150] see about going this afternoon.

Mr. LILLICK.—Q. Mr. Davis, what did the engines burn?

A. Twenty-four per cent gravity fuel oil.

Q. Are there any fumes from a fuel oil of that grade? A. No, sir.

Q. Do you know whether Mr. Paladini ever saw this tow-line and bridle? A. I do not.

(Testimony of Orville Davis.)

Q. Whose duty was it to see that this tow-line was good and efficient? A. My duty.

Q. What employee of A. Paladini inspected vessels belonging to the company to pass upon their need for new equipment? A. I did.

Q. How long had Kruger been captain of the "Three Sisters," if you know? A. I do not know.

Q. Do you know how long he worked for you after this accident?

A. Two or three months; I don't remember the length of time.

Q. And during that time, where was he working, where was the vessel operating?

A. I had him fishing part of the time.

Q. And in doing fishing, in what waters would he fish? A. The Pacific Ocean.

Q. What is your own opinion of the competency of Mr. Kruger? A. He is a very good man.

Q. What was the "Corona" used for during the time that this pier was being built up at Point Reyes?

Mr. HEIDELBERG.—That is objected to, your Honor, as immaterial, irrelevant and incompetent, and as having nothing to do with the issues in this case.

The COURT.—Objection overruled.

A. To carry fish from Point Reyes to San Francisco, and the supplies for the pile-driver crew, and water.

Mr. LILLICK.—Q. Who instructed Kruger

(Testimony of Orville Davis.)

about what he was to do when he went up to Point Reyes?

A. I gave him the instructions. [151]

Q. What were your instructions to him on this particular voyage?

A. To go up and get the pile-driver.

Q. Between the 6th of June and the 8th of June, 1923, what, if any, instructions did you give the "Corona" about going up?

A. To bring the men down from Point Reyes when the job was finished.

Q. Mr. Davis, from whom do you obtain your instructions as to what shall be done with the vessels?

A. Well, if I don't know myself I go to A. Paladini.

Q. What is the situation with reference to orders for the four vessels which you are now operating; in other words, where do you obtain your instructions as to what you shall do with those vessels?

A. From the main office.

Q. Have you anything to do individually with where they shall operate? A. No.

Q. You said a moment ago if you didn't know yourself you got your orders from the main office.

A. Yes.

Q. Where does the information or instruction come from that you referred to as that which you know yourself?

A. I couldn't get that question.

Q. Perhaps I am not putting that very clearly.

(Testimony of Orville Davis.)

In order to explain an answer you made a moment ago, you said that when you don't know where they are to go yourself, you ask the main office?

A. Yes.

Q. You exercise no independent judgment, do you, about how the vessel shall operate; you are always acting under the orders from the main office, are you not? A. Yes, sir.

Mr. HEIDELBERG.—That question is slightly leading.

Mr. LILLICK.—I should say that it is very leading, but I am trying to hurry along, and that is my excuse for the question. [152]

Q. And those orders always come from the main office? A. Yes.

The COURT.—Q. Did Mr. Paladini tell you definitely to send the "Three Sisters" after the pile-driver and the "Corona" after the workmen, or was that your own judgment?

A. Your Honor, I didn't quite get that.

Q. You sent the "Three Sisters" after the pile-driver and the barge? A. Yes.

Q. Did Mr. Paladini tell you to do that?

A. Yes.

Q. You told the "Corona" to go up and get the men, did you? A. I did.

Q. Did Mr. Paladini tell you to do that?

A. He did.

Mr. LILLICK.—That is all, your Honor.

(Testimony of Orville Davis.)

Cross-examination.

Mr. HEIDELBERG.—Q. You say you were chief engineer on the "Corona"? A. I was.

Q. Up to what time were you chief engineer on the "Corona"?

A. The exact dates I don't remember.

Q. When did you enter the employ of the Paladini Co. as port engineer?

A. I don't remember the exact date.

Q. Your memory is kind of hazy upon when you left the "Corona" as chief engineer?

A. It is.

Q. And it is also hazy as to the time when you entered the employ of A. Paladini & Co. as port engineer; that is true, isn't it? You don't remember those things? A. How is that?

Q. You don't remember when it was that you either left the "Corona" as chief engineer or when you went into the employ of A. Paladini as port engineer?

A. I never did leave the job. I rebuilt the "Corona's" engine before I went as port engineer.

Q. And you stayed on the "Corona" for a certain length of time; now I ask you, when did you cease to be chief engineer on the [153] "Corona."

Mr. LILLICK.—Do you mean the date?

Mr. HEIDELBERG.—Yes.

A. I don't remember the date.

Q. And you don't remember the date when you

(Testimony of Orville Davis.)

entered the employ of A. Paladini as chief engineer? A. I do not.

Q. Yet you remember you made a thorough inspection of the tow-line and of the bridle used in this particular towage. A. Yes, sir.

Q. You do? A. Yes, sir.

Q. In what month did you make that inspection? A. In June.

Q. What time in June?

A. One morning; the exact date I don't remember.

Q. One morning? A. Yes.

Q. As chief engineer of the "Corona" you only had to do with the running of the "Corona's" engines, didn't you? A. As chief enginer?

Q. Yes. A. Yes, sir.

Q. While you were operating on the "Mississippi" you had nothing to do but steer the boats, had you? A. Yes.

Q. And when you were with Fairbanks-Morse, what experience did you have?

—A. What experience did I have?

Q. Yes, what was your experience, what were your duties with Fairbanks-Morse?

A. To repair and install engines.

Q. Engines? A. Yes.

Q. During that time you never had anything to do with ropes, at all, did you? A. Yes.

Q. How did you have anything to do with ropes around engines?

A. We lift them with ropes occasionally.

(Testimony of Orville Davis.)

Q. Did you do that, or did some contractor do that, or some other man?

A. I did; I ran the gang that did it.

Q. For whom did you run this gang?

A. For the Fairbanks-Morse [154] Company.

Q. How long ago was that?

A. Just before I went to work for Paladini.

Q. That was straight up and down lifting and hoisting, was it? A. Not always.

Q. Did you ever have anything to do with towing when you were with Fairbanks-Morse?

A. No, no towing.

Q. Did you ever have to do any towing when you were on the "Mississippi"? A. Yes.

Q. What did you tow on the "Mississippi"?

A. Coal barges, log rafts.

Q. You were only a pilot on the "Mississippi," were you not? A. I was an engineer, also.

Q. The only experience you have ever had, then, in towing, was on the "Mississippi": Isn't that true? A. No.

Q. Where did you have any more experience?

A. In the San Joaquin River.

Q. In the San Joaquin?

A. Yes, and in the Sacramento.

Q. Did you ever have any experience outside?

A. Yes.

Q. Where?

A. From San Pedro to San Francisco.

Q. What were you doing then?

A. Chief engineer on the motorship "Oronite."

(Testimony of Orville Davis.)

Q. How big a vessel was she? A. 1600 tons.

Q. And you were chief engineer on that vessel, the "Oronite," 1600 tons? A. Yes, sir.

Q. As chief engineer, did you have to do with fixing the tow, or did you have to do with running the engines?

A. I had to do with running the engines.

Q. And running the engines only? A. No.

Q. You were not the only member of the crew of that boat, were you? A. I was.

Q. There was a captain on board, wasn't there?

A. Yes. [155]

Q. And he was in charge of the vessel, presumably, wasn't he? A. He was.

Q. You did not give instructions to the captain, did you? A. No.

Q. Mr. Davis, do you now say you remember having examined this bridle in June of 1923, this particular bridle that was used in towing barge 61 back from Port Reyes?

A. I examine all equipment.

Q. Just answer my question. Do you now remember of your own knowledge having examined this particular bridle and swivel that was used by the "Three Sisters" in towing barge 61 back from Point Reyes on the 8th day of June, 1923?

A. I remember.

Q. And what was the dimension of the steel rope attached to that bridle, or of which the bridle was composed? A. I should judge about 7/8.

(Testimony of Orville Davis.)

Q. You should judge about 7/8: Do you know the difference between 7/8 and 3/4? A. Yes.

Q. Do you know the difference between a 7/8 rope and a 3/4 rope; you say you do?

A. How is that again?

Q. Do you know the difference when you see them, by looking at them, whether or not a steel cable is 7/8 or whether it is 3/4 of an inch?

A. That is a very close margin to work on. To get it exactly you would measure it.

Q. Then you mean to say that you cannot tell the difference between a 7/8 rope and a 3/4 rope by looking at them, or by feeling them: Is that your testimony?

Mr. LILLICK.—I think the witness has answered the question.

The COURT.—Let him answer it again.

A. You can tell about it, but not exactly, no one can.

Mr. HEIDELBERG.—Q. Then you now give it as your positive testimony that that was a 7/8-inch steel cable attached to it, do you?

A. That is my recollection.

Mr. LILLICK.—Now, just a moment. I object to that question, [156] your Honor, because Mr. Heidelberg has put it this way: You now testify that it was a 7/8-inch cable. He has not so testified.

The COURT.—He said about 7/8; he also says that it is hard to tell, and, of course, I know that.

Mr. HEIDELBERG.—Q. What did you do in

(Testimony of Orville Davis.)

examining the bridle and swivel; just tell us what you did?

A. Well, exactly, I cannot remember that far back, but I know I did examine it.

Q. Yet you don't remember what day you examined it? A. Exactly, personally, no.

Q. How many vessels did you have under your supervision during the first week of the month of June, 1923? A. About six, I think.

Q. Did you make any examination of the rest of those during the first seven days of June?

A. Not all of them, some of them were not in.

The COURT.—Q. Was this the only towing that Paladini did about that time?

A. No—yes, I think that was the first, and then afterwards there was a barge towed to Point Reyes.

Q. This particular barge, do you mean, or some other one?

A. Another barge, at just about that same time.

Q. That was a fishing barge, was it?

A. Yes, sir.

Q. The business was not that of towing, generally, was it? A. No, sir.

Q. The business is fishing? A. Yes.

Mr. HEIDELBERG.—Q. Prior to the towing of this barge 61 back from Point Reyes you had not had any experience at all with Paladini in towing, had you? A. Not that I remember of.

Q. You were not port engineer when barge 16 was taken up to Point Reyes, were you? [157]

(Testimony of Orville Davis.)

The COURT.—16 was the fish barge?

Mr. HEIDELBERG.—Yes, that was the fish barge.

A. Yes, I was.

Q. Wasn't that taken up during the month of May, 1923? Don't you remember that?

A. I don't just exactly remember now.

Q. Well, you don't remember, and you would not say that you were port engineer at the time that barge 16 was taken up to Point Reyes, were you? A. Well, I get mixed up with this year.

Q. Yes, I think that is what has happened. Where did you find this swivel? Where was it when you examined it?

A. That I don't remember exactly.

Q. Did you measure the length of this rope when you spread it out, as you say? A. No.

Q. How did you measure it, how did you gage it?

A. By experience from seeing lines before.

Q. Did you stretch it out in one long line, or did you stretch it out and roll it up, or what did you do?

A. No. I took it off the coil. I did it alone. I would take hold of it and carry so much of it out and then go and get so much more.

Q. What did you do with that rope when you got through with it?

A. Left it lying on the dock.

Q. On the dock? A. Yes.

Q. How do you know that that was the rope that was used by the "Three Sisters"? Can you

(Testimony of Orville Davis.)

answer that question? If you cannot answer it just say so. You don't know that it was the rope used, do you? A. Yes, sir.

Q. How do you know it?

A. Because I seen it on the boat before she pulled out.

Q. You saw it on the boat before she pulled out? A. Yes, sir.

Q. Where was it on the boat?

A. Just exactly where I don't [158] remember.

Q. What did you do with the swivel and the bridle after you got through examining it?

A. I didn't do anything with it.

Q. You must have done something with it. You either let it lay on the wharf or you did something with it, didn't you, after you got through examining it? Have you answered the question?

A. I don't remember.

Q. You don't remember. Now, Mr. Davis, let me ask you this question: Did you examine the wire rope of which that bridle was composed?

A. I am sure I did.

Q. Don't you know whether you did, or not?

Mr. LILLICK.—The witness has said he is sure he did.

Mr. HEIDELBERG.—All right, we will take that answer.

Q. What was the condition of that wire rope, as to whether or not it was rusted?

(Testimony of Orville Davis.)

A. Well, I don't think it was rusted, because if it had been I would have noticed it.

Q. Now, Mr. Davis, we don't care what you think at this particular time. Have you any knowledge as to whether or not that wire rope was rusted at that time?

A. Well, I can say that it was not.

Q. You would say that it was not rusted at all, would you? A. Yes.

Q. Was there any oil on the swivel?

A. I don't remember.

Q. You don't remember that, whether there was any oil on the swivel or not?

A. There probably wasn't.

Q. There probably wasn't; but you don't know now of your own knowledge. You don't know of your own knowledge that there was no oil on it?

A. No.

Q. You didn't put any oil on it, did you?

A. I did not.

Q. Wasn't that swivel some rusted?

A. Probably it was colored, but not rusted. [159]

Q. Did you, Mr. Davis, personally examine the pin in that swivel?

A. I examined the swivel.

Q. You examined the pin in the swivel and you would say that it was not rusted at all?

A. I would say that it was not rusted.

Q. It would turn freely? A. Yes.

(Testimony of Orville Davis.)

Q. And you don't remember what you did with it after you examined it?

A. No. I probably let it lay where I examined it.

Q. Well, how do you know, then, if you let it lay where you examined it, that it was the swivel that was used by the "Three Sisters" in towing the barge down—the swivel and the bridle?

A. How is that?

Q. If you let this lay on the wharf, how do you know it was the particular swivel of the bridle that was used in this tow on June 8, 1923?

A. I have no means of knowing.

The COURT.—Q. At what wharf was it when you examined it? A. 23.

Q. Did you have any other bridle there?

A. Not that I know of.

Mr. HEIDELBERG.—Q. Where did you get this swivel?

A. I didn't get the swivel.

Q. I mean the day that you examined it, where did you get it? A. I didn't get it.

Q. Where did you find it when you examined it? did you find it on the wharf?

A. I would not say exactly.

Q. Don't you remember whether you went aboard the boat and brought it out, or whether somebody placed it on the wharf for you to examine? A. I do not.

Q. You don't remember where you examined it, do you?

(Testimony of Orville Davis.)

A. On Pier 23 or on the boat, probably.

Q. You remember you examined the rope on the pier, don't you? A. Yes. [160]

Q. Or did you examine the rope on the pier?

A. Yes, I examined the rope on the pier.

Q. But you don't remember whether you examined the swivel on the boat or on the wharf?

A. I do not.

Q. Did you know that this same rope, tow-rope and swivel, was used in towing down at Santa Cruz in between the time the tow of barge 61 was made on May 10th and the barge on June 8, 1923? In other words, do you know that that same rope was used in different towing during that same period of time? A. You mean before?

Q. Yes. A. No.

Q. You don't know what happened to that rope in between the time of May 10, 1923, and June 8, 1923, do you?

A. It was on the dock, I think, at Pier 23.

Q. On what date?

A. It was on the dock in June.

Q. What June—June, 1923?

A. June, 1923.

Q. What part of June?

A. The fore part of June.

Q. Are you sure that it was there before the 8th day of June?

A. That is where I got it from when I wanted a tow-line.

(Testimony of Orville Davis.)

Q. Did you have to go get a tow-line for this particular tow?

A. I had to supply the boat with a tow-line.

Q. Wasn't the boat already supplied at that time with the same tow-line that they used the week previously in towing down at Santa Cruz?

A. The tow-line was on the dock.

Q. Then you mean to tell us that you found a tow-line on the dock and not on the boat?

A. The tow-line was on the dock.

Q. You didn't put it on the boat, did you?

A. I don't remember whether I did, or not.

Q. Don't you remember whether you went aboard the "Three Sisters" and got that tow-line, or not? A. No. [161]

Q. Don't you remember that you never even saw this swivel before June 8, 1923?

The COURT.—I think he might be confused about the dates, there. Let me put the question to him this way:

Q. You remember the day the accident happened, that is, you remember that an accident happened, don't you? A. Yes.

Q. The "Three Sisters" came back to port with two wounded men aboard? A. Yes.

Q. A few days before that, you testify that you sent the "Three Sisters" up to bring back the barge. A. Yes.

Q. Did you examine the bridle just before she went out on that last trip to bring back the barge?

A. Yes, sir.

(Testimony of Orville Davis.)

Mr. HEIDELBERG.—Q. You know you did that, and yet you don't know when you became port engineer for A. Paladini & Co.; you don't know that, do you? A. The exact date, no.

Q. What date in June did the "Three Sisters" leave for Point Reyes to bring this barge back?

A. About the 5th or 6th of June, I think, somewhere along in there.

Q. Were you in the courtroom yesterday?

A. Part of the time.

Q. Did you hear Captain Kruger testify that this swivel had been in the hold of this vessel, the "Three Sisters," all the time since he towed the barge up on June 8, 1923? A. How is that?

Q. Did you hear Captain Kruger testify here yesterday that this swivel had been in the hold of the "Three Sisters" from May 10, 1923, to June 8, 1923? A. No, I didn't.

Q. Don't you know that that is the fact?

A. No, I don't.

Q. Don't you know that the only time it was taken out was, as Captain Kruger testified, when he used it to tow once at Santa Cruz?

A. How is that?

Q. Don't you know that this swivel had been in the hold of the [162] vessel "Three Sisters" continuously from May 10, 1923, to June 8, 1923, and that the only time it had been taken out between those two dates was once at Santa Cruz to make a tow down there? Don't you know that?

A. No.

(Testimony of Orville Davis.)

Q. Did you go down into the hold of the "Three Sisters" and drag up that swivel to be examined by you? A. No.

Q. And you did not see anybody else do it, did you? A. Not that I remember.

Q. Where did you find the swivel?

A. I don't remember.

Q. And yet you do remember that you examined it? A. Yes.

Q. And you examined it minutely, carefully?

A. That is my business.

Q. Answer my question. I say do you now remember that you did examine this particular swivel on or before the 5th day of June, 1923, very carefully?

A. I remember of examining the tow-line, the bridle.

Q. How long were the strands on this bridle?

A. How long were the strands?

Q. Yes, how long were the two sides of the rope, this bridle? A. Possibly 30 or 35 feet.

Q. And you say the rope was 600 feet long?

A. As nearly as I can remember between 500 and 600 feet.

Q. Where did you find the bridle?

A. I don't remember where I found the bridle.

Q. Was the bridle connected with the swivel when you found it?

A. Was the bridle connected with the swivel?

Q. Yes. A. It probably was.

Q. It probably was; I am asking you was it.

(Testimony of Orville Davis.)

A. Yes.

Q. It was. How was it attached—by a thimble, or otherwise? A. A thimble.

Q. It was attached by a thimble?

A. It was spliced in with a [163] thimble, in the eye.

Q. What kind of an outfit was this particular swivel? A. Exactly, I don't remember.

Q. You cannot say exactly?

A. Not exactly. It was spliced in. I remember of examining the splices.

Q. Could you go to the blackboard and draw a picture of that particular swivel?

A. No, not exactly.

Q. How many thimbles did it have on the end of this swivel that was nearest the barge that the bridle was attached to?

The COURT.—I don't understand that question.

Mr. HEIDELBERG.—How many thimbles did it have on the end of the swivel nearest the barge and to which this rope forming the bridle was attached?

The COURT.—You are practically asking him how many thimbles it had all together, aren't you?

Mr. HEIDELBERG.—No, I am asking him about this particular end.

The COURT.—Well, I don't understand it. I don't see how there could be any thimbles on any side except on the barge side.

(Testimony of Orville Davis.)

Mr. HEIDELBERG.—That is the very question I am leading up to, your Honor.

The COURT.—All right, go ahead.

Mr. HEIDELBERG.—Q. Were there any thimbles on this swivel on any side except the barge side?

A. I am sure there were thimbles on both sides.

Q. A thimble on both sides?

A. Two on one side and one on the other.

Q. What is the shape of the two on the barge end? A. Exactly, I don't remember that.

Q. You don't remember that?

A. Not exactly, no. [164]

Q. What is the shape of the one that you say was in front?

A. I don't remember the exact shape.

Q. Were they the same, or were they otherwise?

Mr. LILLICK.—Just what do you mean by the shape? A thimble is a thimble.

Mr. HEIDELBERG.—I mean just this: I am not a seafaring man or a seagoing lawyer. I think I know what a thimble is like, though.

Mr. LILLICK.—All right, we will all be glad to be enlightened by you.

Mr. HEIDELBERG.—I think I can make a picture of it so that at least I will understand it when I get through with it.

Q. Look at this. What is that, Mr. Davis? You know that that is the pin, don't you?

A. That is the pin.

(Testimony of Orville Davis.)

Mr. LINGENFELTER.—It looks like a dumbbell.

Mr. HEIDELBERG.—Now, Mr. Davis, that is a pretty fair picture of a swivel, isn't it? A. No.

Q. I mean just pretty fair. Perhaps a draftsman would say I was a good lawyer. That is the end the ropes were attached to, isn't it? You get some kind of a glimmering of this, don't you, Mr. Witness, from this drawing?

Mr. LILLICK.—I ask that that remark go out, your Honor, as improper.

The COURT.—Counsel is just indulging in a little facetiousness.

Mr. HEIDELBERG.—No, your Honor, I really was in earnest then.

The COURT.—I would not ask him too much about that. I think we have had plenty on that.

Q. Mr. Davis, counsel is asking whether the drawing he is [165] putting on the board is a picture of that swivel.

A. Yes, it has some resemblance.

Mr. HEIDELBERG.—I am getting encouraged.

The COURT.—What is it that you call the thimble?

Mr. HEIDELBERG.—That is what you call the thimble. There is another one in the front.

The COURT.—Q. What is the one in front for?

A. For the rope to go through. It is to keep it from cutting the line.

Mr. LINGENFELTER.—Q. Mr. Davis, you

(Testimony of Orville Davis.)

have one of those bridles down on the wharf now, haven't you? A. Yes.

Q. Is the shackle that is now on that bridle that is on the wharf the same kind of a shackle that was used on this voyage on the 8th of June?

A. How is that?

Q. I say, is the shackle on the bridle that you have now on the wharf the same kind of a shackle that was on the bridle that was used when the barge was towed down from Point Reyes, or is it a different kind? A. They are all the same kind.

Q. Can you bring that bridle into court?

A. Yes.

Mr. HEIDELBERG.—We can see it when we go down there to see the boat.

Q. I believe you testified, Mr. Davis, that you did not know what you did with this swivel after you made your examination of it.

A. I don't remember what I did with it.

Q. Then I ask you again, how is it you know that the swivel you examined was the swivel which was used in the tow from Point Reyes down here on the 8th day of June, 1923. You don't know that it was, do you? A. Well, I have no proof for it.

Q. Did you ever see that swivel afterwards?

A. I did not.

Q. What happened to that tow-rope when the "Three Sisters" brought it in: Did you ever see that afterwards? [166]

A. Yes, the tow-rope was put on the dock.

(Testimony of Orville Davis.)

Q. When; I mean in relation to the accident, when was it?

A. I don't remember just when.

The COURT.—It must have had the swivel attached to it.

Mr. HEIDELBERG.—That is just what I am getting at, may it please the Court.

Q. When was that put on the dock?

A. I don't remember.

Q. You don't remember even whether it was in the month of June, or not, do you?

A. It might have been.

Q. You didn't make any other examinations of that rope during the month of June, did you?

A. Not that I know of.

Q. Did you ever see that rope after June 8, 1923?

A. Yes, sir.

Q. You don't remember when, though?

A. Yes, we had rough weather one night, and I went down and tied up the boats.

Q. And you used the tow-rope to tie up the boats? A. I did.

Q. And at that time it didn't have the parts of the bridle attached to it, yet, did it?

A. I think not.

Q. As port engineer, didn't you ask what had happened to that bridle when the "Three Sisters" came in? A. I don't remember.

Q. You don't remember whether you asked that, or not? A. No.

(Testimony of Orville Davis.)

Q. Didn't you ask what had happened to the swivel? A. No.

Q. Didn't you know you had borrowed that swivel and bridle from Crowley's, and that you had to return it? A. I never borrowed it.

Q. But you knew that it had been borrowed, did you not? A. No.

Q. You were on the "Corona" when she went up to pick up this barge, weren't you?

A. When she went up to pick up the barge, you say?

Q. Yes. A. No.

Q. You were not chief engineer on the "Corona" then? A. No. [167]

Q. How long before that time had you ceased to be chief engineer on the "Corona"?

The COURT.—He has told you a number of times that he cannot remember that; why repeat it?

Mr. HEIDELBERG.—I thought I might help his memory by that, your Honor. I didn't think of the barge incident before. However, I will withdraw the question.

Q. You never had the parts of the swivel attached to that barge after the accident, did you?

A. How is that again?

Q. You never saw the parts of the bridle that were attached to the bitts on the barge after the accident, did you? A. I did not.

Q. Didn't you make any inquiry about it?

A. I don't remember.

(Testimony of Orville Davis.)

Q. You were in charge of the equipment of A. Paladini, Inc., at that time, were you not?

A. I was.

Q. Did you not deem it your duty to make inquiry as to what had happened to the bridle on that boat?

Mr. LILLICK.—That is objectionable, your Honor, what he deemed to be his duty is not pertinent here.

The COURT.—Let him answer it.

A. Well, I don't remember whether I did inquire or not.

Mr. HEIDELBERG.—Q. Didn't Crowley make a demand on you later for the production of that bridle and the swivel?

A. I believe he did some time later.

Q. You take your orders from A. Paladini?

A. Yes.

Q. Where does he give you those orders?

A. Up at the market.

Q. Isn't he oftentimes down on the dock?

A. Sometimes.

Q. Quite frequently down on the dock, isn't he?

A. I have seen him there several times.

Q. And he has given you orders around the dock down there? A. I don't remember that he has. [168]

Q. What examination did A. Paladini give you as to your competency before he hired you as port engineer? A. No examination that I know of.

Q. No examination. You simply resigned your

(Testimony of Orville Davis.)

position, or were transferred, from chief engineer of the "Corona" to that of port engineer: Is that true? A. No.

Q. Did you resign?

A. No, I did not resign. I rebuilt the engines of the "Corona," and the chief was aboard, and from there I went as port engineer.

Q. That is what I was asking you, Mr. Davis. In other words, you just transferred from being chief engineer of the "Corona" to that of port engineer? A. Yes, sir.

Q. You never had had any experience with A. Paladini, Inc., other than your work on the "Corona"?

A. Well, I did a job on the "Corona" one time before.

Q. That was a rebuilding job of the machinery?

A. No, that was truing up a crank pin that was burned out.

Q. It was a mechanical job? A. Yes.

Q. So that save and except the work you had done on the "Corona," you had never had any other experience in your employment with A. Paladini?

The COURT.—Q. Can you get that bridle and bring it out here by two o'clock? A. Yes, sir.

The COURT.—We will take our recess now until two o'clock.

(A recess was here taken until two o'clock P. M.)

[169]

AFTERNOON SESSION.

ORVILLE DAVIS, cross-examination (resumed).

Mr. HEIDELBERG.—Mr. Reporter, will you read the last question?

(Question read by the reporter.)

A. No.

Q. You were not always down at the dock, were you, Mr. Davis, when these boats came in?

A. No.

Q. You were not present at the time the "Three Sisters" came in after this voyage, were you—I mean, down at the dock?

A. I went down that night.

Q. You went down that night? A. Yes, sir.

Q. Did you go aboard the "Three Sisters" that night? A. I did.

Q. Did you make an examination of the towing apparatus there on that boat that night?

A. I did not.

Q. You knew that owing to the breaking of this towing apparatus there had been a serious accident, did you not? A. I did.

Q. You were in charge of the equipment for A. Paladini, were you not? A. I was.

Q. And you say you made an inspection of that equipment three or four days prior to that time, did you not? A. I did.

Q. Were you not somewhat interested in finding out how the equipment had broken?

A. At that time I was interested in getting the barge back, sending a towboat out after her.

(Testimony of Orville Davis.)

Q. Did you send a towboat out to get the barge?

A. The "Corona" came in in the meantime and they had taken the barge in tow.

Q. Where had the "Corona" been before that?

A. She was on her way up to Point Reyes.

Q. Didn't she continue on her way up to Point Reyes? [170] A. I think not.

Q. Is it not a fact that the "Corona" continued on her way to Point Reyes on that particular voyage, and picked up the barge and brought her back?

A. All I know is she picked up the barge.

Q. You don't now say that you instructed the "Corona" to go up there and pick up the barge, do you?

A. No.

The COURT.—He didn't say anything like that.

Mr. HEIDELBERG.—He just said he instructed the towboat to go out and get the barge.

The COURT.—No, he didn't. He said he went down to see about getting a towboat to get the barge, but in the meantime the "Corona" came in with the barge. He didn't say he sent a towboat after the barge.

Mr. HEIDELBERG.—Q. When you went down to see about getting a towboat to get the barge, what time was that? A. I don't know.

Q. Was it night-time? A. Yes, sir.

Q. What time did the "Corona" get in with this barge?

A. She didn't tow the barge into Frisco.

Q. Did you find out when you were down there

(Testimony of Orville Davis.)

that the "Corona" was up at Point Reyes and was to get the barge?

A. What is that again, please?

Q. Did you find out when you went down to the "Three Sisters" that the "Corona" was on her way up to take charge of the barge? A. I did not.

Q. Did you have any talk with Captain Kruger on the night of June 8 on board the "Three Sisters"? A. I don't remember any talk.

Q. Did you go aboard the "Three Sisters" on the night of June 8th? A. I did.

Q. Did you see Captain Kruger on the night of June 8th, 1923? [171] A. I did.

Q. Did not Captain Kruger at that time tell you that the "Corona" was going to bring the barge back? A. No.

Q. Did you ask him anything about what had happened to the barge?

A. He told me she was floating out at sea.

Q. Didn't he tell you at the same time the "Corona" was going to bring her in? A. No.

Q. Didn't he tell you that they had a conversation with the Captain of the "Corona" as they passed, and that he had made arrangements for having the barge brought back? A. No.

Q. And you didn't ask Captain Kruger anything about how the accident happened?

A. Not at that time.

Q. And you didn't make any inspection of the apparatus, at all? A. Yes, sir.

Q. What did you inspect?

(Testimony of Orville Davis.)

A. I went down to the engine-room and looked over the engine.

Q. I mean of the towing apparatus, in particular. A. I never inspected the towing apparatus.

Q. And yet you knew there had been an accident by reason of the breaking of that towing apparatus? A. Someone telephoned to me.

Q. And you knew it when you got aboard the "Three Sisters," didn't you? A. Yes, sir.

Q. Now, Mr. Davis, you say you issued instructions to the "Corona" to go up there and get these passengers on Saturday, June 8th.

A. Yes, sir.

Q. What other duties did she have at that time?

A. To bring down fish.

Q. How is it that you gave instructions to the "Corona" to go up there on June 8th and bring down these passengers when you [172] knew that the "Three Sisters" was already up there?

A. The "Three Sisters" went after the barge.

Q. The "Three Sisters" had previous to that time, to your knowledge, carried these passengers back and forth, had she not? A. No, sir.

Q. Do you now say that she never did?

A. Not that I know of.

Q. Don't you know that at three different times the "Three Sisters" took these men up to Point Reyes? A. No, sir.

Q. And on three different occasions brought them back? A. I do not.

(Testimony of Orville Davis.)

Q. How long had you been port engineer up to the time of this accident and you didn't know that?

A. The exact time I don't remember; it was just a short time.

Q. Did you ever issue any instructions to Captain Kruger that he was not to carry passengers on the "Three Sisters" at all?

A. That he was not to carry passengers?

Q. Yes.

A. No, I don't think I told him not to.

Q. Didn't you know that the standing order was that whenever the "Three Sisters" was at Point Reyes, or at San Francisco, and the men wanted to be transferred either way, that he was to take them or bring them? A. Again, please?

Q. Didn't you know there was a standing order out to the effect that if the "Three Sisters" was in San Francisco or at Point Reyes at any time when these pile-drivers wanted to go back or forth to San Francisco or to Point Reyes, that the "Three Sisters" was to carry them? A. No, sir.

Q. You never countermanded such order as that, did you? A. Nobody gives those orders but me.

Q. There had been a port engineer prior to the time that you were appointed engineer, had there not, namely, Captain Carlton? [173] A. Yes.

Q. You didn't know anything about the orders that he had issued, did you? A. No, I didn't.

Q. And you never countermanded any of his orders, did you?

(Testimony of Orville Davis.)

A. How could I, when I knew nothing about his orders?

Q. You never had any conversation with Captain Kruger that he was not to bring down these men, had you? A. No.

Q. What were your exact words to Captain Kruger when you sent him up there on or about June 5, 1923?

A. As nearly as I can remember I told him to go and get the pile-driver at Point Reyes, and there was something said about the men up there, and their baggage, and I said, "They can come down on the 'Corona' as usual."

Q. As usual? A. Yes, sir.

Q. Why did you say "as usual"?

A. Because they had been coming down on the "Corona."

Q. Had they been coming down on the "Corona" any more times than they had come down on the "Three Sisters"?

A. I don't know of their coming down on the "Three Sisters."

Q. Don't you know now that they did come back on the "Three Sisters"? A. No, I don't.

Q. Weren't you on the "Corona" at various times when you went up there and got those men?

A. No, sir.

Q. Where were you at the time?

A. I had a shop and I was probably in the shop.

Q. When you said "as usual," you didn't mean that, did you? You meant just according to your

(Testimony of Orville Davis.)

understanding of the situation. You don't mean to say it was the usual situation that these men always went back and forth on the "Corona," do you? A. I think that they always did. [174]

Q. Yes, that is according to what you thought. What is the cubic space in the forecastle of the "Three Sisters"? A. I have not measured it.

Q. What is it in the galley?

A. I have not measured it.

Q. How big a space has the "Three Sisters" in the forecastle? In other words, how many people would it accommodate?

A. She sleeps four. Probably eight men could sit in there all right.

Q. On the "Three Sisters"?

A. On the "Three Sisters."

Q. And the galley would accommodate how many? A. Probably four in the galley.

Q. What did they have in this galley at that time, June 8, 1923? A. The usual equipment.

Q. And what is that?

A. A stove, cooking utensils.

Q. And you still say there was room for four men in there? A. Yes.

Q. How much clearance was there on the bow of the "Three Sisters," from the water, in front of the companionway that leads down, or about at the companionway? What was the water clearance there; how high did the "Three Sisters" stand above the water at the bow just about opposite the companionway, there?

(Testimony of Orville Davis.)

A. Just what part of the "Three Sisters"?

Q. Just about opposite the companionway, in front.

A. Taking it over all?

Q. Yes, the rail and everything.

A. Probably 22 or 23 feet.

Q. Above the water?

A. Do you mean the freeboard?

Q. Yes.

A. I don't just get exactly what you do mean.

Q. To put it in very plain language, I mean how high above the water was the top of the rail in the bow of the "Three Sisters" just about opposite the companionway? A. 4½ or 5 feet. [175]

Q. It does not take much of a wave to wash over that, does it? A. It takes quite a good wave.

Q. Spray would fly over it very easily, wouldn't it?

A. It is according to what kind of weather you have.

Q. What is the gross tonnage of the "Three Sisters"?

A. I would guess about 21 or 22.

Q. You say you would guess? A. Yes.

Q. 21 or 22?

Mr. LINGENFELDER.—Mr. Heidelberg, we are endeavoring to get a copy of the registry.

Mr. HEIDELBERG.—I want to show the acquaintanceship with it of this man. I don't care what it actually is. I want to know what he says it is.

(Testimony of Orville Davis.)

Q. You would say it is about 21 or 22 tons?

A. Yes, about that.

Q. What is the net tonnage?

A. About 10 or 12; about 12.

Q. Has the "Corona" any certificate of inspection for carrying passengers?

Mr. LILLICK.—We are not concerned with that, your Honor, except as it might go to the credibility of this witness. It doesn't make any difference whether the "Corona" carried passengers, or not, we are concerned with the "Three Sisters."

The COURT.—What difference does that make, Mr. Heidelberg?

Mr. HEIDELBERG.—I will withdraw the question.

Q. What is the gross measurement tonnage of the "Three Sisters"?

Mr. LINGENFELTER. He has answered that question.

Mr. HEIDELBERG.—No, he has not.

A. About 21 or 22, so far as I know.

Q. It would be the same as the gross tonnage; is there any difference between the gross measurement tonnage and the gross tonnage?

A. I never heard of measurement tonnage. [176]

Q. Have you ever seen a certificate of inspection for the "Three Sisters"? A. I have.

Q. Where is that certificate now?

A. It is on the boat.

Q. What does it say, if you know?

(Testimony of Orville Davis.)

A. I don't know exactly; no.

Q. When did you see it last?

A. Probably five or six months ago.

Q. She never has been inspected for carrying passengers, has she, to your knowledge? A. No.

Q. She has no equipment for carrying passengers?

A. She has equipment to take care of a fishing crew. She is a fully equipped fishing boat, according to law.

Q. But only for fishing?

A. She is a fishing boat.

Q. She is not a towboat?

A. A fishing boat tows at times.

Mr. HEIDELBERG.—I think that is all.

Redirect Examination.

Mr. LILLICK.—Q. When you saw the bridle that was taken by the "Three Sisters" when she went up to bring the barge back, did A. Paladini, Inc., have any other bridle?

A. No, sir, not that I know of.

Q. This was a borrowed bridle?

A. So I understand.

Q. And the bridle that you did inspect that you have testified to was the only bridle that A. Paladini, Inc., had down at the dock at that time, was it?

A. It was the only one I know of.

Q. So that if you made an inspection of a bridle at that time, it was the bridle which the "Three Sisters" took up, wasn't it?

(Testimony of Orville Davis.)

Mr. HEIDELBERG.—I object to that as calling for the conclusion and opinion of the witness.

Mr. LILLICK.—I will withdraw the question.

Q. When you went down to the "Three Sisters" upon her return that evening, when the men were brought in, what condition did you find the engines in?

A. I never give them a thorough [177] examination until a few days later, but I found a pin out of the governor.

Q. What was that caused by, if you know?

A. Well, probably the overspeeding of the engine.

Q. Do you know whether or not the engine's pistons were frozen?

A. When I got around to the back and opened up the base plate, I found that three pistons had been scoured.

Q. And that scouring could have been done by what? A. Overloading the engines.

Q. And by "overloading," what do you mean?

A. Too much engine speed.

Q. Will an engine of that type of vessel act as a gas engine does in an automobile where when the engine is new, if you speed it you will be liable to freeze the piston? A. Much more so.

Q. You say much more so? A. Yes.

Q. And it is for the same reason that in automobiles a new automobile is run at a low rate of speed until thoroughly broken in: Is that true?

A. Yes, sir.

Q. I call your attention to the bridle that is here

(Testimony of Orville Davis.)

in court, and ask you whether the thimble, the shackle, and what we have been terming the swivel is of the type that was used by the "Three Sisters" on this occasion? A. Partly so.

Q. Will you explain what difference, if any, there is in this one that is in court here today?

A. Instead of having the shackle here you had a thimble and your rope spliced into the thimble.

The COURT.—Q. That is, the ends of this iron cable were fitted into a thimble?

A. The iron cable was fitted like this is, but she didn't have a shackle here; she had a thimble like this, only that it was larger, and it was in here.

Mr. LILLICK.—Q. Mr. Davis, I am told that the record, [178] that is, the testimony here, so far as we have gone, indicates that where the bridle is connected with the swivel there were not two eyes on the cables attached to it; in other words, that the bridle, itself, ran through a link. What was the situation on the bridle that the "Three Sisters" used: Was it attached in the way this bridle is, which is here in court? A. Like that.

Q. Like this? A. Yes.

Q. So that the bridle on the "Three Sisters" was not a bridle that was made by having a 75-foot wire rope with a link over that one rope?

A. No, sir.

Q. In other words, each side of the bridle was attached to the swivel by a separate eye?

A. Yes, sir.

(Testimony of Orville Davis.)

The COURT.—Does anybody know where these two steel cables broke? Is there any evidence of that anywhere?

Mr. HEIDELBERG.—Not so far, your Honor, but I think we will be able to supply some information as to that; some of our men were looking at it, and they can tell what appeared to them to be the situation.

Mr. LILLICK.—Q. Were you port engineer at the time you made the inspection of the bridle at the time when the "Three Sisters" went up?

A. Yes, sir.

Q. Who hires the captains who operate the fishing vessels that A. Paladini, Inc., owns?

A. A. Paladini.

Q. My attention has been called to the fact that there is no testimony by you with reference to Captain Kruger having been told to go up to the pier and bring back the pile-driver; who ordered him to do that? A. I did.

The COURT.—I think he has testified to that.

Mr. LILLICK.—I thought that had been gone into, too, your Honor.

Q. Was there any general order given by you to Kruger to bring [179] the men down when the "Corona" was not there? A. No, sir.

Mr. LILLICK.—That is all.

Recross-examination.

Mr. HEIDELBERG.—Q. Captain Davis, will you step down here, please. I want to be perfectly

(Testimony of Orville Davis.)

clear in this matter. This is what you call the shackle, is it? A. Yes.

Q. You have testified, I believe, that the difference between this swivel and the swivel that was used was the fact that they had a thimble attached to this end? A. Yes, sir.

Q. Attached to this shackle ?

A. No, attached to the swivel.

Q. Attached to the swivel in place of the shackle?

A. Yes.

Q. Is that the only difference between the swivel that is here before you now and the swivel that was used and that you inspected? If there is any other difference, point it out, please.

A. Well, I think it was a larger and a better shackle.

Q. It was a larger and a better shackle; you mean by that the swivel? A. The swivel.

Q. But you cannot see any other difference at all in this swivel with the exception that in place of the shackle they had a thimble, and that the other was a larger and better one than this?

A. This is not a standard equipment.

Q. I am not asking you that. I am asking you what is the difference between this one and the one you inspected.

A. It had a thimble in the eye of the swivel, instead of the shackle.

Q. And that is the only difference between the construction of this swivel and the one that you inspected? A. Yes.

(Testimony of Orville Davis.)

Q. Now, let me ask you if it is not a fact that you did not make a minute and a careful examination of that other swivel?

A. I am sure that I did. [180]

Q. But you now give it as your testimony that the only difference between that swivel and this swivel is the fact that that swivel was probably a larger swivel than this, and that it had a thimble instead of the shackle? A. As far as I know.

Q. As far as you know. You looked at both of them. You inspected the other one, didn't you?

A. But that has been a long time ago.

Q. But you thoroughly inspected it at that time, and you knew the exact condition of it, didn't you?

A. The other one was standard construction.

Q. What is the difference between standard construction and this?

A. The shackle on the other one and the thimble.

Q. That is the only difference you know of, the fact that it had a thimble instead of a shackle?

A. As far as I know.

Mr. HEIDELBERG.—That is all.

Mr. LILLICK.—Q. How about the rust that we see here and the indication of rust on the swivel; I don't know whether there is anything in counsel's examination of you that would need to be pointed out, but are you testifying that this bridle here that we have before us is the same as the bridle that you saw on that occasion, with the same amount of rust upon it?

(Testimony of Orville Davis.)

Mr. HEIDELBERG.—Oh, I didn't intend anything like that at all.

Mr. LILLICK.—There is no point made about the rust on it?

Mr. HEIDELBERG.—No.

Mr. LILLICK.—This swivel was just picked up down there and brought into court to illustrate this matter.

The COURT.—Q. Has that swivel been galvanized? A. Yes, sir.

Q. It has been? A. Yes.

Mr. LILLICK.—Q. Do you know whether the swivel on the "Three Sisters" had been galvanized?

A. Yes, sir.

Q. Galvanizing is for the purpose of keeping off rust, is it? [181] A. Yes, sir.

Mr. LILLICK.—That is all.

TESTIMONY OF ALEXANDER PALADINI, FOR PETITIONER.

ALEXANDER PALADINI, called for the petitioner, sworn.

Mr. LILLICK.—Mr. Paladini, what is your connection with A. Paladini, Inc.?

A. President.

Q. Have you any other office besides that of president of the company? A. How is that?

Q. I say, have you any other office besides that of president of the company?

A. Yes, general manager.

(Testimony of Alexander Paladini.)

Q. How many directors are there of A. Paladini, Inc.? A. Seven, I think.

Q. Who are they?

A. Myself; Attilio Paladini; Walter Paladini; Hugh Paladini; Henrietta Paladini; Joseph Chicca, who is the secretary.

Q. Which of those directors have any position with the company requiring them to be at the office or offices of the company? A. I don't get you.

Q. Which of those directors has any position with the company requiring them to be at the office or offices of the company; which of them take an active part in the business?

A. All of them are taking an active part in the business outside of Henrietta Paladini and Hugo Paladini.

Q. What positions do they occupy, I mean the others?

A. My brother Attilio is manager of the Oakland Branch; Walter is with me in the wholesale house; Mr. Chicca is secretary. That is about all. I am the president.

Q. What have they to do with the actual operation of the vessels, the equipment of the vessels, the running of the vessels?

A. Nothing, whatsoever. [182]

Q. How do the vessels obtain their orders, as to what to do and where to go?

A. Through Mr. Davis, the port engineer.

Q. What does that port engineer actually do?

(Testimony of Alexander Paladini.)

A. The port engineer comes to my market every morning and asks me, or, if I am not there he may ask my brother, if I happen to be out of town, if there are any instructions to be had, and if so we give them to him, and he, in turn, carries them out.

Q. What do you mean by instructions, what kind of instructions?

A. If I have fish at Point Reyes, and I get a telephone from my place up there that there are fish up there, we will tell him to get the boat ready and send it out and pick up the salmon at Point Reyes.

Q. What do you do, or what do any of the directors do, about seeing to it personally whether the boat is properly equipped to do that work?

A. Nobody does that outside of myself. Mr. Davis takes care of my boats, and if any new equipment is necessary I tell him to go and get it, to keep them in running condition.

Q. How many vessels did you own in May and June, 1923?

A. Four large boats in San Francisco.

Q. What were they?

A. The "Iolanda," the "Henrietta," the "Corona" and the "Three Sisters."

Q. Who was your port engineer in June, 1923?

A. Mr. Davis.

Q. Who was your port engineer in May, 1923?

A. Mr. Carlton.

Q. How long had Mr. Carlton worked for you?

A. About two years.

(Testimony of Alexander Paladini.)

Prior to that do you know what he did?

A. Yes; all the wholesale dealers were pooling on their fishing; it was called the Associated Trawling Co.; they went out from Meiggs Wharf; there were three or four port engineers taking care of twelve boats. Finally, that disbanded, and we all took our boats [183] back again, and each company took a port engineer; I took Mr. Carlton.

Q. How long had Mr. Carlton been with the Associated Trawling Co.?

A. I should judge a year and a half, or something like that.

Q. Did you know anything about his work while he was port engineer of the Associated Trawling Co., how he did it, whether he did it well or ill?

A. Yes, my understanding is that he did it very well.

Q. Who employed the captains for the boats?

A. I do, with the assistance of my port engineer.

Q. How did you select Kruger?

A. Kruger was brought to me by my port engineer, Mr. Carlton; he told me we needed another captain. He said, "What do you think about Mr. Kruger?" I said Mr. Kruger was working for the Associated Trawling Co. for F. E. Booth, and as I understand it he has a wonderful reputation. I spoke to Mr. Booth one day. I said to him, "I contemplate giving Mr. Kruger a job as captain of one of my boats, what do you think about him?" He said, "He is one of my pet men, he is on the job all the time, never misses a day, I hate to see him

(Testimony of Alexander Paladini.)

go." So I told Mr. Carlton to go back and hire him, that he was all right.

Q. Who hired the crews for the boats?

A. I hired the head fisherman and my head fisherman hires the other fishermen. We have a head fisherman who directs the captain to take him to certain fishing grounds; he hires the fishermen under him. I look out for the head man; the men under him are taken care of by the head fisherman.

Q. That has to do with the head fisherman; who took care of the employment of the deck hands, such as Anderson, who was the deck hand on the "Three Sisters"? A. The port engineer. [184]

Q. Who did you deal with at the Healy-Tibbitts Construction Co. when you entered into this contract with them under which they drove the piles for your pier at Point Reyes?

A. Myself personally nobody; I had Mr. Del Savaro. I told him I was about to build a wharf at Point Reyes, and could he help me out. He said yes, he could, that he would go out and get figures for me and bring them in. So he went out, and he came and told me that Healy-Tibbitts & Co. were the most responsible people, and could put up the job in the shortest time, and so I said, "All right, if their prices are right I will give it to them." So the contract was drawn up and I signed it.

Q. Who furnished the barge? A. I did.

Q. Who furnished the pile-driver?

A. Healy-Tibbitts.

(Testimony of Alexander Paladini.)

Q. Who furnished the men who worked the pile-driver? A. Healy-Tibbitts.

Q. Did you have anything to do with the hiring or discharging of those men?

A. They were supposed to complete the wharf for a certain sum of money.

Q. Did you have anything to do with taking the men up or bringing the men back, in so far as your contract with the Healy-Tibbitts Construction Co. went? A. No, sir.

Q. Did you know anything about the men being brought back and forth to and from the pier?

A. No. The only thing I know is that Mr. Davis came to me one day and he made the point that the men would like to come back to San Francisco week-ends, or something like that. I said, "Well, we have the 'Corona,' any time they want to go up or come down they could use the 'Corona.'" That is all I said to him with regard to bringing any men up or bringing any men back.

Q. Was any charge made for bringing them back and forth?

A. No, there was no charge for that. We did that more as an [185] accommodation.

Q. As an accommodation to Healy-Tibbitts, or to the men, themselves?

A. Well, if we didn't take them back they would have to go to Inverness and grab the stage, or something like that; they would have to walk about 20 miles.

(Testimony of Alexander Paladini.)

Q. Did your boats bring back anyone as a matter of accommodation from the pier other than these men?

Mr. HEIDELBERG.—That is objected to as entirely immaterial, irrelevant and incompetent.

Mr. LILLICK.—I withdraw it. All of it is immaterial, as a matter of fact. Had you or I been up there and had asked to get a ride it would have been given.

Q. While the pier was being built, Mr. Paladini, did you visit it at any time? A. I did.

Q. How did you go up?

A. I went up with Mr. Del Savaro once or twice, I cannot remember just exactly which it was, it was once or twice.

Q. Did you go up by water?

A. No, by machine.

Q. Were you at any time aboard the pile-driver, or the barge, while that work was going on?

Mr. HEIDELBERG.—That is objected to as immaterial, irrelevant and incompetent.

Mr. LILLICK.—Perhaps it is.

Q. Did you know anything about the equipment with which the barge was taken up, the pile- driver?

A. No, sir.

Q. Did you know anything about the equipment with which it was brought back? A. No, sir.

Q. Did you have anything to do with that at all?

A. No, sir. All I did was to tell my port engineer that we had to tow a barge from San Francisco to Point Reyes and back again, and to make the neces-

(Testimony of Alexander Paladini.)

sary arrangements to have the barge brought [186] up there and back again.

Q. I was referring in my question to equipment.

A. No, sir.

Q. You did tell your port engineer to send it up and bring it back? A. Yes, sir.

Q. Was anything said at that time about the "Three Sisters" bringing back the men?

A. No, sir.

Q. Did you give any instructions with reference to the "Three Sisters" carrying the men?

A. No, sir.

Q. How did you hire Mr. Davis; what did you know about Mr. Davis when you hired him?

A. Mr. Davis came to me and asked me if he could have a job as an engineer. I told him I would see. I went down and I spoke to Mr. Carlton, and I says, the engineer that he had on the "Corona" was not very satisfactory, and I think he was leaving—I think that was it, or something like that; I says, "Mr. Davis, I knew he worked on the 'Corona' once before from the Fairbanks-Morse people, and he helped to build the engine up." I also spoke to Mr. Cooper, of the Peterson Launch and Towboat Co., and asked him if he knew anything about Mr. Davis, and he told me that for a Diesel boat he was about the best man I could find. So on that recommendation I hired him.

Q. How many of those four boats were Diesel boats?

(Testimony of Alexander Paladini.)

A. There were two Diesel engines on the "Corona," and one on the "Three Sisters."

The COURT.—Q. The "Corona" was the larger boat, was it?

A. Yes, sir, it was one of the sub-chasters; it was 110 feet long.

Mr. LILLICK.—Q. Did you have any personal knowledge of the condition of either the bridle or the tow-line that was used? A. No, sir.

Q. Did you have any immediate control of the vessel, itself, [187] on the trip? A. No, sir.

Q. Did you personally have anything to do with the outfitting of the "Three Sisters"?

A. No, sir.

Q. Did you have anything to do with the choosing of the bridle that was put on the tow-line?

A. No, sir.

Q. How, if at all, would you, as president of the company, hear of the need of a new tow-line?

A. That was the instruction given to my port engineer—anything that was necessary, to get anything at all for the maintaining and upkeeping of those boats, for him to go and get it.

Q. Would he ever report the need of any particular thing to you?

A. Well, if it was something that amounted to lots of money he would, but small things like that—a tow-line, or ropes, or anything like them—he had orders to go and get them.

Q. How about authority to purchase such a thing

(Testimony of Alexander Paladini.)

as a bridle without referring it to you—would he have such authority?

A. Oh, yes. We give him an order blank, and everything he purchases he puts down on the order blank and turns a duplicate copy in to the office and states what it is for.

Q. Had Kruger, or Carlton, or Davis, any one of them, ever reported to you or to your office, to your knowledge, that the tow-line or the bridle the "Three Sisters" was using was inefficient?

A. No, sir.

Q. In the course of the business, who would report to you the need of a new tow-line, if you had needed one?

A. Mr. Davis, the port engineer—whoever was port engineer at the time.

Q. The directors whom you mentioned as not having anything to do with the office work, did they have anything to do with the vessels?

A. No, sir.

Q. Did any of the other officers have anything to do with the vessels?

A. No, sir. If I happened to be out of town and my [188] brother was there, if he had any instructions he would tell the port engineer in the morning what instructions he had, the same as I would, in case I happened to be out of town.

Q. Which brother is that? A. Walter.

Q. And would those instructions cover anything other than to send a vessel here or send a vessel

(Testimony of Alexander Paladini.)

there, or to go here for fish, or to go there for fish?

A. No. We have two fishing boats. They go fishing every day but Saturday. Those boats are out every day but Saturday. All Mr. Davis has to do with those boats is to see that they are kept up, and to buy whatever equipment is necessary for fishing. Then we have another boat that goes to pick up the fish, up at Point Reyes or at Bodego Bay. If the boats are out they will ring us up that they are in and have some fish. Mr. Davis passes out the word to go to Point Reyes, or to Bodega Bay, or to wherever it may be, and bring the catch in that night.

Q. Does A. Paladini, Inc., buy fish from other fishermen? A. Yes.

Q. What proportion of the fish that you wholesale do you catch and bring in yourself?

Mr. HEIDELBERG.—I cannot see the materiality of that, your Honor.

Mr. LILLICK.—The materiality of it is very plain. We are trying to convince the Court, and counsel on the other side, that this operation of the vessels was a very small part of the business of A. Paladini, Inc., wholesale fishermen.

Mr. HEIDELBERG.—It happens to be a very important part in this instance.

Mr. LILLICK.—Then you should not object to it.

The COURT.—I will let him answer it.

(Testimony of Alexander Paladini.)

A. About 20 or 25 per cent. [189]

Mr. LILLICK.—That is all.

Cross-examination.

Mr. HEIDELBERG.—Q. You say, Mr. Paladini, that Mr. Davis came to you and stated that the men wanted to come back and forth week-ends.

A. He told me that somebody came to him asking that the men at Point Reyes want to come down. I said "If they want to come down you have the 'Corona' there and they can use the 'Corona.' "

Q. I understand you to say that that was the first you knew of the men wanting to come down for week-ends, that it was when Mr. Davis reported it to you: Is that true? A. Exactly.

Q. When was that reported to you?

A. After the work was being erected—after the piling was being driven down.

Q. Don't you know, as a matter of fact, that the men did not come back from Point Reyes at all after June 8th, when Mr. Davis was appointed your port engineer, that they only came down once, and that was the final trip?

A. I don't know whether they did, or not. He came to me and asked me about the men coming down, and I said, "If they want to come down you have the 'Corona' there and bring them down."

Q. Your words were that he came to you and said the men wanted to come down for week-ends: Isn't that true?

(Testimony of Alexander Paladini.)

A. I don't know whether he used the words "week-ends," or not.

Q. That is what you said.

A. I may have said that, but he said they wanted to come down, and I said the "Corona" is there and they can come down on the "Corona."

Q. When did that conversation take place?

A. When?

Q. Yes. A. In my market.

Q. I say when did it take place?

A. Toward the end of the job.

Q. When did you hire Mr. Davis as your port engineer?

A. I do not know. I would have to look at my records to find out. [190]

Q. It was the 1st of June, wasn't it?

A. I don't exactly remember just what date it was; it was around that time, somewhere around there.

Q. How long had Mr. Davis been your port engineer up to the time of this accident?

A. Not very long.

Q. Less than a week, wasn't it?

A. Maybe a week or two. If you want me to confine me to just how long I will have to get my books to tell you.

Q. Is it not a fact that Mr. Carlton left your employ as port engineer on the last day of May, 1923? A. He may have.

Q. And that Mr. Davis succeeded him?

A. Yes.

(Testimony of Alexander Paladini.)

Q. And so you say now it was Mr. Davis that came to you and told you how the men wanted to come back and forth at week-ends?

A. I don't know just exactly whether it was week-ends, or whether they said they wanted to come back. I remember telling him if they wanted to come back they could use the "Corona."

Q. Didn't you know, as a matter of fact, the "Three Sisters" had been taking them up there and bringing them back? A. No, sir.

Q. Didn't Mr. Martin Brown telephone you and tell you you would have to furnish transportation for these men? A. No, sir.

Q. Wasn't it ever reported to you that Martin Brown insisted on transportation for these men?

A. No, sir.

Q. Are you sure now, Mr. Paladini?

A. My agreement with the Healy-Tibbitts Construction Co. never mentioned anything about transporting the men.

Q. Let me ask you if it is not a fact, Mr. Paladini, that Mr. Martin Brown telephoned you and told you that the men would not leave at three o'clock in the morning when the barge was towed up, and that you had to take them up on another boat, and that as a result of that you sent the "Corona" back after she towed [191] the "Three Sisters" out a little way with this barge, you sent the "Corona" back and picked up these men at the wharf at about six o'clock in the morning?

A. No, sir.

(Testimony of Alexander Paladini.)

Q. Is it not a fact that Martin Brown had that conversation with you and told you the men refused to go out at three o'clock in the morning?

A. No, sir.

Q. How was it that the "Corona," after towing the "Three Sisters" and this barge out came back and picked up the men at about six o'clock in the morning?

A. The reason they came back, as I understand it, is they were towing the barge out in tandem, and they encountered a heavy sea outside, and they didn't need two boats to tow the barge up, and the "Corona" turned back.

Q. Then what did the "Corona" do?

A. I don't know.

Q. Don't you know the "Corona" came back to the wharf to take those men up there?

A. No, sir.

Q. And don't you know that that was by appointment? A. No, sir.

Q. Don't you know that Mr. Carlson absolutely refused, on behalf of himself and his gang, to go up at three o'clock in the morning, and that as a result of that you sent this boat back at six o'clock to meet them? A. No, sir.

Q. And don't you know further that the "Three Sisters" brought these men up there on three different occasions and brought them back on two different occasions during the construction of this work? A. No, sir.

Q. You never issued any orders to the effect

(Testimony of Alexander Paladini.)

that these men were not to ride on the "Three Sisters," did you?

A. I didn't issue any orders.

Q. And you know that the "Three Sisters" did take water and supplies up to them, don't you?

A. I know that one of our boats was taking water up there; whether it was the "Corona" or the "Three Sisters," I don't know. [192]

Q. You know that both of those boats were assigned to taking care of these men, don't you?

A. At that time of the year our salmon season starts, and we have a station at Point Reyes, and also we have a place at Bodega Bay, and we are running up there every day.

Q. You do know, as a matter of fact, that both the "Corona" and the "Three Sisters" were running back and forth between Point Reyes and San Francisco, don't you?

A. There is no argument about that.

Q. And that they were taking supplies up to these men, and you know that materials were being transported up there by those boats: You know that, don't you?

A. That part of it is all right.

Q. You didn't make any investigation of Mr. Davis other than just what you have stated, did you? A. I thought that was enough.

Q. Didn't you have any other tow-lines or bridles on the morning of June 5, 1923, that belonged to Paladini, Inc.?

(Testimony of Alexander Paladini.)

A. I never knew what a bridle was, to tell you the truth.

Q. You didn't have any at all?

A. I know what it is now, but I didn't know what it was then.

Q. Who is Del Savaro?

A. Del Savaro is the contractor.

Q. He is an Italian contractor, isn't he?

A. Yes.

Q. He is not a seafaring man?

Mr. LINGENFELTER.—Just what do you mean by an Italian contractor; is there any insinuation on the nationality?

Mr. HEIDELBERG.—Now, forget that, won't you?

The COURT.—Now, Gentlemen, that will be all of that. Proceed with the examination.

Mr. HEIDELBERG.—Q. He is an Italian, and he is a contractor: [193] That is what I mean.

A. Yes.

Q. And you know he is not a seafaring man?

A. Not a seafaring man, no.

Q. What kind of contracting does he do?

A. He builds houses.

Q. And he is a friend of yours?

A. It is all right for him to be a friend of mine. That is all right. There is no secret in that. He built the superstructure on my wharf and I paid him for it.

Q. Yes, that is what I am getting at; he is a building contractor, isn't he? A. Yes.

(Testimony of Alexander Paladini.)

Q. And you know what he is, because you have known him for some time? A. Sure.

Q. Who is Martin Brown?

A. I don't know; I don't know that I ever met him.

Q. You talked to him over the telephone?

A. I may have, I don't know.

Mr. HEIDELBERG.—That is all.

Redirect Examination.

Mr. LILLICK.—Q. Do you remember how long after this accident in June you first heard that the men were going to make a claim against A. Paladini, Inc.?

A. I think six or eight months must have elapsed before I heard about it; Mr. McShane came down to my office one day and told me he was trying to collect some insurance for the men. That was the first time I ever heard anything about it.

Q. Up to that time did you know anything about the necessity of making an investigation as to how the accident had happened? A. No. [194]

TESTIMONY OF DAVID CROWLEY, FOR PETITIONER.

DAVID CROWLEY, called for the petitioner, sworn.

Mr. LILLICK.—Q. Mr. Crowley, what is your connection with the Crowley Launch & Tugboat Company? A. Manager.

Q. How long have you been its manager?

(Testimony of David Crowley.)

A. About 20 years.

Q. How long have you been in the towboat business? A. All my life.

Q. Will you, with this bridle that we have here, explain to us what the thimble is? Point out the thimble on this bridle.

A. These are two thimbles.

Q. The witness pointing to the two ends.

The COURT.—I know what a thimble is. The thimble I have been accustomed to, however, is where the cable passes through and is flanged out and fastened with babbitt.

Mr. LILLICK.—That is the kind I have been familiar with, your Honor.

Q. Will you explain to us what difference, if any, there was in the shackle that in 1923 was on all of the bridles that were owned by the Crowley Launch & Tugboat Co.?

A. The bridle we had comes over here and turns right through here. This is a different kind of a shackle.

Mr. HEIDELBERG.—It is different entirely.

Mr. LILLICK.—Now, just a moment. The witness says that the bolt or rivet, or pin comes through on the other side, your Honor. Now, counsel's remark, "It is entirely different," I would like to have expunged from the record.

The COURT.—All right, expunge it from the record. As I said before, I do not expect to decide this case, or any other case, on the remarks of counsel.

(Testimony of David Crowley.)

Mr. LILLICK.—I sometimes feel it is important however, your Honor, to call attention to the remarks of counsel as you [195] are going by.

Q. Then the shackle to which the tow-line, itself, would be connected on the bridles owned by the Crowley Launch & Tugboat Company in 1923, will you explain that, Mr. Crowley?

A. There would be another thimble like this going in here, and the rope would come around here, spliced into the thimble.

Q. So that the tow-line would be looped through here?

A. The thimble would come here like that, and here would be the rope; the tow-lines we have have this thimble right here on this shackle—not on this one. This thimble would be here, and another thimble would be here.

Q. So that, as a matter of fact, there would be three thimbles? A. Yes.

Q. One leading to each bitt on the barge?

A. Yes.

Q. And the third straight to the tow-line?

A. Yes.

The COURT.—Q. Are those swivels galvanized?

A. Yes, they are galvanized.

Q. Do they rust readily?

A. No, except if you leave them like this. There is no place for it to rust. It has to be galvanized, otherwise it would rust. Maybe that is why they are galvanized, because otherwise they would rust.

(Testimony of David Crowley.)

Mr. LILLICK.—Q. You are acquainted with Barge 61? A. Yes.

Q. Do you know what pile-driver the Healy-Tibbitts Construction Co. used on Barge 61, in June, when they took it up to Point Reyes?

A. No, I don't know that.

Q. Do you know with whom the Healy-Tibbitts Construction Co. arranged for Barge 61 at the time they did the work up at Point Reyes?

A. Mr. Figari, I think.

Q. Are you acquainted with the "Three Sisters," do you know the boat called the "Three Sisters"?

A. I have seen her; I am not [196] acquainted with her. I have seen her from a distance, I have been close by and around her.

Q. What type of towing does the Crowley Launch & Tugboat do?

A. All kinds of towing; towing barges, and vessels, and things like that. There are different varieties of towing.

Q. Will you explain to us why, with a barge without a rudder, such as Barge 61, it is necessary to use a bridle instead of having a straight towline?

A. The bridle is used because when a barge takes a sheer in the seaway, the bridle straightens her up. If you had rudders on the barge, you would not need a bridle. When they start to sheer the bridle will bring them back again on a line.

Q. What is the size of the wire rope making up

(Testimony of David Crowley.)

the parts of the bridles used by the Crowley Launch & Tugboat Co., in June, 1923?

Mr. HEIDELBERG.—I think counsel should ask what sizes were used.

Mr. LILLICK.—Very well, I will accept the suggestion.

A. There was only one size wire we used, a 7/8 wire.

The COURT.—Q. Steel?

A. Steel wire. Regular towing wire they call it.

Mr. LILLICK.—Do you know anything about the borrowing or the hiring of a bridle from you in June, 1923, by the Healy-Tibbitts Construction Co. for use on this barge?

A. I know that they borrowed a bridle, because I was told that they borrowed a bridle.

Q. Who arranged for the barge?

A. Mr. Figari; Willie always attends to those matters.

Q. Who is Mr. Figari?

A. The superintendent of the Crowley Launch & Tugboat Co.

Q. And who for the Healy-Tibbitts Construction Co. hired the barge?

A. Martin Brown does the hiring of floating equipment. [197]

Q. Do you know in this particular instance whether or not the barge and the bridle that were used to tow up the pile-driver to Point Reyes in May of 1923 were the property of the Crowley Launch & Tugboat Co.?

(Testimony of David Crowley.)

A. Yes. We loaned it to the Healy-Tibbitts Construction Co.

Cross-examination.

Mr. HEIDELBERG.—Q. Mr. Crowley, are you sure that all of your swivels are galvanized?

A. Yes.

Q. Are you familiar with the swivel which now reposes underneath your counter in your main office? A. No.

Q. You would be surprised to find out that that was not galvanized, wouldn't you?

A. I would be more than surprised, because we don't use any swivels that are not galvanized.

Q. You would be surprised if I told you that that had a bolt in there that was not galvanized at all?

A. Unless the galvanizing wore off the swivel. That is the only way it would not be galvanized.

Q. Your swivels are, as to the bolt, entirely different in construction from this swivel that you see here?

A. Yes, entirely different.

Q. They are not anywheres like this, which has no bolt? A. No.

Q. And the swivel which you loaned to Paladini through Healy-Tibbitts was a swivel that was entirely different from this one?

A. Yes, it was different from that swivel there.

Q. Even if a bolt were galvanized, it would, by constant friction, wear off, wouldn't it?

A. Yes.

(Testimony of David Crowley.)

Q. And then it would become rusted, wouldn't it? A. Yes, if it wore off.

Q. You don't know anything of your own knowledge, Mr. Crowley, about Healy-Tibbitts securing this bridle and equipment from [198] you, do you? A. No, I don't know anything about that.

Q. You only know that Willie Figari attended to it? A. Yes.

Q. And Willie Figari is a very able, competent fellow, isn't he? A. Yes.

Q. He had charge of your equipment at that time? A. Yes.

Q. And he knows what kind of equipment you had at that time?

A. All the time. That is what he is supposed to know, to know those things.

Redirect Examination.

Mr. LILLICK.—Q. Speaking of this particular equipment, in comparison with the equipment that was on the bridle that you used in May and June, 1923, is it not a fact that just as this bridle has one end connected with the bridle and the other end with the tow rope, there are links on each side?

A. Yes, sir.

Q. They were alike in that? A. Yes, sir.

Q. Were they not alike in the fact that to one of the links was attached a thimble leading to a wire that ran to one of the boats? A. Yes.

Q. And were they not also alike in that on the other side was a similar thimble leading to a bitt?

A. Yes.

(Testimony of David Crowley.)

Q. Weren't they also alike in that the link nearest the towboat was free on a pivot and turned?

A. Just the same.

Q. And is it not a fact that the only difference at all between the two was that where there is a shackle here, or what we used to call a clevis, there was a thimble on the one you used in May and June, 1923?

A. Just like this, with a manila rope in it.

Q. And the only other difference was that the pin, instead of being a part of one of the links, ran through as a pin or a rivet running free on both ends instead of only one?

A. Yes. We run it free on both ends.

Q. That is, instead of only one?

A. Yes. [199]

Mr. HEIDELBERG.—Q. That difference, to you, is very noticeable, isn't it, that difference in the construction? A. Yes.

Mr. LILLICK.—Q. Did you ever see one of these that was rusted or frozen tight?

A. If the galvanizing gets off it and it lies idle it will rus*h* up. That is what it is galvanized for. The bare iron will naturally rust if it is not galvanized.

Q. Do you ever use shackles of that type in your work when they are so frozen?

Mr. HEIDELBERG.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—I think that what is done generally, Mr. Lillick, is of very little value.

(Testimony of David Crowley.)

Mr. LILLICK.—Q. Have you ever seen one of those frozen and rusted?

Mr. HEIDELBERG.—The same objection.

The COURT.—Let him answer.

A. If it is froze it won't work, you can't use the bridle, this part of it won't twist. That is what it is there for, to keep the turns out.

Mr. LILLICK.—That is all.

TESTIMONY OF WILLIAM FIGARI, FOR PETITIONER (RECALLED).

WILLIAM FIGARI, recalled for petitioner.

Mr. LILLICK.—Q. Mr. Figari, I want to direct your attention to the swivel that was on the bridle that was used in making the tow back and forth to Point Reyes. Do you remember it?

A. Yes, I do.

Q. Do you remember whether or not it ran freely, or whether it was frozen tight?

A. Well, I didn't examine it as to whether it ran freely, or not. I didn't examine it. It was up to the [200] captain of the boat. I took it off one of our boats that was using it.

Q. One of the boats that was using it?

A. Yes, and if it had been so frozen he would have wanted another shackle.

Mr. HEIDELBERG.—That is objected to as immaterial, irrelevant and incompetent, and calling for the opinion and conclusion of the witness, and I move to strike it out.

(Testimony of William Figari.)

The COURT.—No, I will let it stand.

Mr. LILLICK.—Did you see it, Mr. Figari?

A. I saw the shackle. I looked from the dock on to the boat and looked at the shackle.

Q. Did it show any signs of rust?

A. Well, they were all rust; the galvanizing wears off. It won't get so rusty that it will stick the pin in there, the pin will always work free. Some of them are not galvanized.

Q. Do you remember what boat this was taken off of?

A. No, I don't recollect—yes, I do, it was one of the big boats. We have since disposed of the boat.

Q. And was it then in use on that boat?

A. Yes, sir.

Cross-examination.

Mr. HEIDELBERG.—Q. You have now and you did have in June, 1923, some swivels that were not galvanized?

A. Yes, some of them were not galvanized—very few of them, though.

Q. As a matter of fact, Mr. Figari, you testified this morning, did you not, that you did not handle this swivel at all?

A. I said I looked at it from the dock.

Q. You looked at it from the dock while it was on the boat? A. Yes.

Q. And you told the captain to put it on the wharf? A. That is it.

Q. And that is all you know about it?

A. That is all I know about it.

(Testimony of William Figari.)

Q. I call your attention to this swivel that is here in the [201] courtroom, and I ask you if there is not to your eye a very noticeable difference between that swivel and the one that you let Paladini have.

A. Yes, there is. Our pins run right straight through, they are not forged on the other end.

Q. And that difference is a very pronounced difference, and you noticed it immediately, did you not?

A. Yes, I did. We have no thimbles like that at all, we don't use them.

Q. You had none of this description, or character, or kind in your possession at all?

A. None at all.

Mr. LILLICK.—Q. They all run freely on both ends, don't they? A. Both ends are free.

Mr. HEIDELBERG.—Q. You say they run free. That is according to your knowledge, is it?

A. All our swivels on both ends all turn. That one is solid on one end.

Q. You mean if they are in good condition they will run that way? A. Yes, surely.

Mr. LILLICK.—That is our case, your Honor. That is, it is our case with one exception. I had forgotten that we want to call another witness. I would like the privilege of calling Mr. Carlton.

Mr. HEIDELBERG.—I would like the privilege of proceeding with a couple of our witnesses now. I would like to put on a couple of witnesses who

(Testimony of Owen Haney.)

will be short, and they are anxious to get away. May I do that now, Mr. Lillick?

Mr. LILLICK.—Certainly. [202]

TESTIMONY OF OWEN HANEY, FOR CLAIMANTS.

OWEN HANEY, called for the answering claimants, sworn.

Mr. HEIDELBERG.—Q. Mr. Haney, where do you reside? A. I reside in Marysville.

Q. On June 8, 1923, where were you?

A. I was up at Point Reyes; I could not swear right to the date.

Q. What was your business or occupation about that time, and for a month prior to that time?

A. Engineer on the pile-driver.

Q. Working for whom? A. Healy-Tibbitts.

Q. Did Mr. Carlson work with you at that time?

A. He was my foreman.

Q. Did you leave San Francisco to go up there first? A. Yes.

Q. Where from? A. Pier 23.

Q. On what vessel? A. The "Corona."

Q. What time of day?

A. Between 6 and 7 o'clock in the morning.

Q. How long were you up at Point Reyes all together?

A. I could not swear right to the time; about five or six weeks, I should judge.

Q. As a matter of fact, wasn't it from May 10 to June 8, 1923?

(Testimony of Owen Haney.)

A. Somewheres along in that neighborhood.

Q. During the time you were up there, did you come back and forth week-ends?

A. No, sir, I didn't.

Q. Do you know whether or not the other men did? A. Part of them came.

Q. On what boats would they come and go, if you know?

A. They came on the "Three Sisters." I think they came down once on her, or twice, and came back on her.

Q. They went back and forth on the two boats, the "Three Sisters" and the "Corona"?

A. Yes, sir.

Q. Do you know now how many times they came on the one or on the other?

A. No, I could not swear to that, because I was [203] paying no attention to it.

Q. On June 8, 1923, you left Point Reyes, did you? A. Yes, sir.

Q. How did you leave Point Reyes?

A. We left the Booth Wharf.

Q. On board what boat?

A. The "Three Sisters."

Q. Calling your attention to about June 6, 1923, I will ask you if at that time you saw the "Three Sisters"? A. Yes, sir.

Q. Did she come into Drake's Bay then?

A. Yes, she came up alongside the scow with some lumber for the dock.

Q. Where were you standing at that time?

(Testimony of Owen Haney.)

A. I was standing back, I was on the hind end of the driver.

Q. Who was around you at that time?

A. There was nobody right around me. They were out in front, in front of the driver, ahead.

Q. Did you hear any remarks made by the captain, Mr. Kruger, at that time, to Mr. Carlson?

A. Well, I could not say direct to him, no.

Q. But you do know that the "Three Sisters" waited over there how long; how long did the "Three Sisters" wait? A. Two days, I believe.

Q. Did you hear the captain make any remarks to anybody at that time when he first came up there?

A. When he came back to the donkey again, he said he was going to wait until we got through and take us down.

Q. He said he was going to wait until you got through and take you down? A. Yes.

Q. That is the substance of it, is it? A. Yes.

Q. You are not pretending to give the exact words, are you? A. No.

Q. Where were you at the commencement of this voyage: Were you on the barge, or on the "Three Sisters"? A. I was on the barge.

Q. What were the men doing there, including yourself?

A. We picked up the anchor with the donkey, and I was filling the boiler full of water, putting the fire out. [204]

(Testimony of Owen Haney.)

Q. You had to use the donkey to pick up the anchor, did you? A. Yes.

Mr. LILLICK.—Your Honor, I object to this as leading.

Mr. HEIDELBERG.—It is, but I am just trying to hurry it up.

Mr. LILLICK.—I don't want you to ask any leading questions at all.

Mr. HEIDELBERG.—I let you get by with a lot of it.

Mr. LILLICK.—Thank you; that was very nice of you.

Mr. HEIDELBERG.—Q. What tow-line did the "Three Sisters" have out when she first started the tow from Point Reyes to San Francisco?

A. I should judge about 50 or 60 feet.

The COURT.—Q. Were you on the barge, then, or were you on the "Three Sisters"?

A. I was on the barge, then.

Mr. HEIDELBERG.—Q. Later on, was that tow-line changed in any way?

A. It was lengthened out some.

Q. You noticed, did you not, that—

Mr. LILLICK.—Now, pardon me, I object to that as leading.

Mr. HEIDELBERG.—Q. Did you or did you not notice the barge as it was being towed from Point Reyes to San Francisco?

A. Naturally you would notice it, looking back at it.

Q. Can you tell us what was the extreme greatest

(Testimony of Owen Haney.)

distance at any time between the barge and the "Three Sisters"?

A. That is, you mean before the line broke?

Q. Yes, at any time, the greatest distance that ever separated the two of them while the barge was being towed.

A. I should judge about 200 feet.

Q. 200 feet? A. At the outside.

Q. Were you ever warned, or was anything ever said to you about any position you should occupy on the boat? A. No, sir.

Q. Did the captain make any remark to you about looking out for the tow-line?

A. No, sir. [205]

Q. Do you know whether the speed of this boat was slowed up, or was increased at any time while the tow was going on?

A. Well, the captain told me he was going to try to make it in five hours. That is all I know. I don't know whether he speeded it, I don't understand them kind of engines.

Mr. LILLICK.—I ask that the words, "the captain told me he was going to try to make it in five hours," be stricken out. The question was, your Honor, how fast the vessel went.

The COURT.—Yes, let it go out.

Mr. HEIDELBERG.—Q. Did you notice any rope on the deck while the barge was being towed?

A. Yes. There was quite a bunch of it coiled up on the deck.

Q. Where was that coiled up?

(Testimony of Owen Haney.)

A. Right back behind the house, the engine-house there, at the foot of the mast.

Q. What did you do with Carlson right after he was injured?

A. We picked him up and laid him down on this coil of rope which was there.

Q. Was the coil of rope wet or dry at that time?

A. It was dry; it had never been out.

Mr. HEIDELBERG.—That is all I will go into with this witness.

Cross-examination.

Mr. LILLICK.—Q. After the accident and you came ashore, where did you go?

A. I went home, over to Emeryville.

Q. Did you call on the men who were hurt, did you call on them afterwards?

A. No, sir; I went up to Healy's office after my money the next day, and I was told that Mr. Carlson had regained consciousness.

Q. Do you know where Mr. Carlson was at that time?

A. Mr. Edwards, in Healy's office, told me he was in one of the hospitals, but I could not say now which one.

Q. When did you see Mr. Carlson again?

A. I don't think I seen [206] Mr. Carlson for six months; I went on another job.

Q. Where was that other job?

A. I went over close to the Moore Shipyards first, pulling some piles out, and then I went up to

(Testimony of Owen Haney.)

San Rafael; practically all over, like us fellows have to go.

Q. Were you working with any of the men who had been working on the Point Reyes job?

A. No, sir; I only worked with one of them since that time.

Q. When did you see that man after the accident? A. Six or seven months.

Q. So that the only two men whom you have seen since who were on the Point Reyes job have been Carlson and this one man?

A. Oh, no, I have seen them all since.

Q. Did you see any of the other men earlier than the six months period which you specified as being the first time you saw Carlson again?

A. I seen one of them over in Oakland, but I never worked with him.

Q. Did you talk to him at all? A. Sure.

Q. Did you talk to him about this job up at Point Reyes, and the accident?

A. Well, naturally, you would talk about the accident.

Q. How long after the accident did you see that man?

A. I seen him the next day after the accident.

Q. You saw him the next day? A. Yes.

Q. Did you discuss it with him at that time?

A. Naturally, we talked about the men getting hurt.

Q. How often did you see him thereafter?

(Testimony of Owen Haney.)

A. That is pretty hard to say; I might see him once a week, maybe on Saturday afternoons.

Q. Where did the bridle break?

A. One of them broke at the thimble and the other one broke at the barge.

The COURT.—Q. Do you mean at the bitt?

A. Yes; one broke [207] at the thimble and the other broke at the other extreme end, where she goes over the bitt.

Mr. LILLICK.—Q. Did the rope, itself, break?

A. No, sir.

Q. What was it that broke? A. The cable.

Q. I meant the wire rope. The cable, itself, broke? A. Yes.

Q. It was not the thimble that broke away from the shackle, it was the rope, itself, that broke?

A. It broke back of the splice.

Q. Was it a clear break, or did it tear apart?

A. It was a ragged break.

Q. Where did the ends remain after the accident, do you remember? A. Which end?

Q. Either end.

A. One piece of the cable remained on the barge, the other one was on the end of the swivel.

Q. So that when *when* the rope was drawn in on the launch it had two broken strands of the bridle appended to it, did it?

A. The thimble was there, and the little pieces of cable where it was spliced in.

The COURT.—The whole swivel was still attached to the line? A. Yes.

(Testimony of Owen Haney.)

Mr. LILLICK.—Q. And the other side of the bridle, as I understand you, broke up near the bitt?

A. Up near the bitt, on the barge.

Q. So there was one long piece of the bridle and one short piece of the bridle? A. Yes, sir.

Q. When did you have your attention first called to the distance between the launch and the end of the barge?

A. I naturally looked at it when we started out towing.

Q. When after the accident, I say?

A. When I came in here to the courtroom, I think.

Q. You heard to-day for the first time that there was a question [208] about the distance between the stern of the tug and the bow of the barge?

A. I heard it yesterday when the captain was testifying.

Q. And that was the first time after the accident that your attention had been called to that point?

A. Whether they had a longer or shorter tow-line.

Q. You are quite sure about that, are you?

A. Yes, sir.

Q. Have you discussed that question with any of the witnesses who have testified for us to-day or yesterday? A. No, sir.

Q. You have only discussed that question with the witnesses whom you believe are to testify for the men: Is that true? A. I believe so.

(Testimony of Owen Haney.)

Q. How much in the way of equipment was loaded on the launch?

A. There were seven or eight mattresses and seven or eight springs and the cooking utensils.

Q. What kind of cooking utensils?

A. Pans and pots, and stuff like that, and a stove; our suitcases.

Q. How many suitcases?

A. Each man would have one, if not two; I know I had one.

Q. Do you know how many suitcases there were?

A. No, sir, I could not swear to how many suitcases there were.

Q. Do you know how many had bags?

A. I know one man had a bag.

Q. How about blankets?

A. We all had blankets.

Q. Were they in rolls, or were they in bags?

A. I know that mine was in a roll.

Q. So that you had a roll, and you had a suitcase? A. Yes.

Q. What else?

A. Some boxes with grub in them.

Q. How many? A. I could not tell you.

Q. How big were the boxes?

A. It is pretty hard to tell that, too, I suppose; they were boxes that the supplies would come in from the grocery stores. [209]

Q. But you don't know how many boxes?

A. No, I couldn't say.

Q. And you don't know how big the boxes were?

(Testimony of Owen Haney.)

A. No; it is pretty hard to tell that.

Q. As a matter of fact, the only suitcase that you know about is the one you carried yourself?

A. No. I know of three suitcases.

Q. What else was there that was loaded on?

A. I don't know personally of anything else.

Q. Where were the mattresses put?

A. Thrown up on top of the deck-house, there.

Q. Where were the springs put?

A. Piled along the side.

Q. On which side? A. The port side.

Q. Where were the boxes put?

A. Some of them were along the side and some on top of the house.

Q. Are you sure there were some on top of the house? A. Yes.

Q. What held them on the house?

A. They were sitting there, just the same as the suitcases were.

Q. There was not enough of a rock to the boat coming in to disturb the boxes on top of that house?

A. It didn't.

Q. Are you quite sure there were boxes piled on top of that house?

A. I am sure my suitcase and my roll of blankets were on top.

Q. I am asking you about boxes. Are you sure the boxes were on top of that house?

A. Pretty sure.

Q. How big were they? Have you any recollection of that?

(Testimony of Owen Haney.)

A. They would not be very big. Grocery stores don't generally send them out in very big boxes.

Q. What was there on the forward deck?

A. In front of the cabin, or the pilot-house, do you mean?

Q. Yes. A. Well, the stove was put up there.

Q. The stove was put up in front?

A. Yes. [210]

Q. Are you sure of that? A. Yes.

Q. What else was there besides the stove that was put up in the front? A. I don't know.

Q. Have you named all of the things that were put on the boat at the pier?

A. I don't know that I have named all of them. I know there were that many mattresses and that many springs there, because there were that many living there.

Q. Do you think you have left anything out, Mr. Haney? A. I don't know, I might have.

Q. Where were you standing on the way down?

A. You mean coming to Frisco?

Q. Coming from Point Reyes to San Francisco, and before the accident.

A. Alongside the pilot-house.

Q. On the starboard side? A. Yes, sir.

Q. You were one of the men who were talking to Anderson? A. Yes.

Q. Was there any water breaking over you?

A. Once in a while there would be some spray come.

Q. Did you get wet? A. No.

(Testimony of Owen Haney.)

Q. There was not enough coming over to wet you in any way, was there?

A. Not right at that time, there was not.

Q. I am speaking of the time up to the accident; there was not enough to wet you, was there?

A. I don't think I was wet very much.

Q. What is your recollection of the room there was on the fore-deck for other men besides you and the man who was with you: Was there room for all of you there?

Mr. HEIDELBERG.—That is objected to as assuming something not in evidence, to wit, that the man was on the fore-deck.

Mr. LILLICK.—He has already said he was forward of the pilot-house.

Mr. HEIDELBERG.—No, he didn't, he said he was alongside it. [211]

The COURT.—Let him answer the question.

A. Well, I guess if they wanted to string out along there they might have been able to string out along there.

Mr. LILLICK.—Q. So your answer is that they might have been able to string out along there, and all get on the fore-deck? A. Stand up there.

Q. Why didn't you stay on the rear deck?

A. Why didn't I?

Q. Yes.

A. Because I wanted to talk to the fellow in the pilot-house, maybe; I just happened to walk up there.

(Testimony of Owen Haney.)

Q. Did you not appreciate that there was some danger from that tow-line

Mr. HEIDELBERG.—That is objected to as being immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. Well, there is always danger.

Mr. LILLICK.—Q. Not only there was always danger, but is it not a fact that that barge was sheering back and forth in this manner behind the launch?

A. It sheered some, of course.

Q. That was why the cable broke, wasn't it?

Mr. HEIDELBERG.—I object to that as calling for the conclusion and the opinion of the witness.

Mr. LILLICK.—Withdraw the question.

Q. You saw the line or hawser running over the after deck of the launch, didn't you, Mr. Haney?

A. Yes, sir.

Q. Didn't you also see that the hawser would cross that deck back and forth with the movement not only of the launch riding over the swells, but also with the sheering of the barge?

A. It was bound to swing some.

Q. It would swing some, and you would have to get out of the way of it if you were near it, wouldn't you?

A. If a man was standing up against it, he might. [212]

Q. It was a dangerous place, wasn't it? You thought so, didn't you, Mr. Haney?

A. There is always danger when you are pulling on a line of any kind.

(Testimony of Owen Haney.)

Q. When did you notice that tow-line piled up at the foot of the mast?

A. I noticed it when they first lengthened it out.

Q. Do you mean before it was lengthened out, or do you mean afterwards?

A. After they lengthened it.

Q. And sitting as you are in that chair, Mr. Haney, how high up did the coil come? Take the floor alongside of your chair as the deck and tell us how high up it came.

A. I should judge up to about there.

Q. So that your feet would not have been able to have rested flat on the floor had you sat on the coil. Was it that high?

A. You could sit on the coil and put your feet down on the floor, I guess.

Q. Then I will ask you to indicate the distance the top of the coil was from the floor.

A. About what I said before.

Q. Will you keep your hand there a moment. I direct your attention to the position in which your hand is and ask you if you were sitting on a level with your hand whether your feet would touch the floor? A. Pretty close to it.

Q. Will you keep your hand there a moment, please. Your foot is flat on the floor. If you were sitting on a level with your hand, is it not a fact that your feet would not touch the floor?

A. I don't know; I would have to try it.

Q. You don't know. A. No, I don't know.

(Testimony of Owen Haney.)

Q. Mr. Haney, I am seriously trying to get from you your opinion how high that coil of rope was.

The COURT.—Q. Couldn't you tell us in feet?

A. I should judge maybe a foot and a half.

Mr. LILLICK.—Q. So that the coil was a foot and a half [213] high from the floor to the top?

A. In that neighborhood.

Q. How far out were the coils in there running? Would the coil of this wire, here, represent approximately the diameter of the coil of the rope that was there on that occasion?

A. I could give you a better idea here, I think; I think it came right around about here; I think it would just about take up the space that is in here.

Q. You mean this whole space?

A. Yes, I think the biggest part of it.

Q. Measuring from here? A. Yes.

The COURT.—Q. About three and one-half feet in diameter?

A. Yes.

Mr. LILLCK.—Q. That would be the outside of the coil? A. As nearly as I could figure it.

Q. Did you put a mattress over the rope when you seated Carlson on it? A. Yes.

Q. So that the mattress was put below him?

A. We set him on it first and then raised him up afterwards and put the mattress under him.

The COURT.—Q. What is the name of the other man that was hurt? A. Sauder.

Q. What happened to him?

(Testimony of Owen Haney.)

A. When the tow-line broke it hit him across the back of the head and the neck.

Q. Were they thrown against the rail, or on the deck?

A. Mr. Sauder was thrown down into the rail and Mr. Carlson was thrown up against it.

Mr. LILLICK.—Q. Did you see them go over; did you actually see the breaking of the line?

A. I didn't see Mr. Sauder go over. I just turned around from the door to walk back that way when it broke. I seen Mr. Carlson jump over like this, and I ran back and got hold of him. [214]

Q. The launch, itself, was going down on a wave at the time of the breaking, wasn't it—on a swell?

A. I could not say as to that.

Q. You don't remember?

A. No, I don't know whether it was going down or coming up.

Q. Did you hold on to the side of the pilot-house as you were coming down in order to keep your feet? A. No, I don't think I did.

Q. The vessel did not roll, then, in those swells?

A. She jumped, but it did not roll.

Q. What was the jumping from?

A. They always do in a ground swell.

The COURT.—Q. A pitch?

A. Yes.

Mr. LILLICK.—Q. How many times, altogether, did men ride down from the job to San Francisco after the job started?

(Testimony of Owen Haney.)

A. I could not tell you just exactly, but every Saturday.

Q. Every Saturday? A. Yes.

Q. So that some of the men came back every Saturday? A. All but about two of us.

Q. How do you fix the vessel as being the "Corona" upon which they came down once or twice and the "Three Sisters" as the vessel on which they came down once or twice?

Mr. HEIDELBERG.—That is objected to as assuming something not in the evidence. The witness definitely stated that he could not fix the number.

The COURT.—Q. Do you know how many times they came on each vessel?

A. No, sir, I couldn't tell you.

Mr. LILLICK.—Q. Do you know how many times they came on the "Three Sisters"?

A. I am pretty sure they came up there two Monday mornings on the "Three Sisters."

Q. How many times did they come down on the "Three Sisters"?

A. Twice, as near as I can recollect. [215]

Q. How do you know it was the "Three Sisters"?

A. Well, I am standing right there on the wharf when they go out.

Q. When was that first called to your attention—yesterday? A. No, sir.

Q. When? A. I always knew that.

Q. I say, when was your attention first called to the fact that it was important to know upon which

(Testimony of Owen Haney.)

of these two vessels these men came back and went up? Was it yesterday in court? A. Yes.

Mr. LILLICK.—That is all.

Redirect Examination.

Mr. HEIDELBERG.—Q. You never measured the size of the rope that was coiled up, did you?

A. No, sir.

Q. And you are just giving your best recollection of the size of it and the height of it? A. Yes, sir.

Mr. HEIDELBERG.—That is all.

The COURT.—Have you heard, Mr. Lillick, whether the boat has got in yet this afternoon?

Mr. LILLICK.—It is not known whether she will be in before five o'clock. I don't want to inconvenience your Honor or counsel on the other side by taking you down there now and perhaps having to wait until five o'clock. What time to-morrow morning would suit your Honor's convenience?

The COURT.—We can go down in the morning. We will leave here, say, at half past nine.

Mr. LINGENFELTER.—I understand that there are two physical differences in the vessel "Three Sisters" as between now and the time when this accident occurred. The fuel tanks that were on top of the engine-house were removed and put below; also there are two winches that have been installed since that time. [216]

Mr. LILLICK.—All that can be explained to-morrow.

The COURT.—Yes, that can be explained when we get there. We will take our adjournment now

and resume the taking of testimony here in court to-morrow morning at eleven o'clock.

(An adjournment was here taken until to-morrow morning, Thursday, August 7, 1924, at 9:30 o'clock, for the purpose of inspecting the boat, and until 11:00 o'clock A. M. for the purpose of resuming the taking of testimony.) [217]

Thursday, August 7, 1924.

PROCEEDINGS ON BOARD THE "THREE SISTERS," AT PIER 23, SAN FRANCISCO, CALIF.

Mr. LILLICK.—There are two structural changes that have been made in the "Three Sisters" that I would like to have indicated. I am told that the winches, one on each side, are new, that they were not on the "Three Sisters" at the time. Another thing: There were two fuel tanks on the house, one on each side of the skylight at the place I am indicating. I will ask Captain Kruger about the sizes of those fuel tanks. Captain Kruger, do you know the sizes of those fuel tanks?

Mr. KRUGER.—They were for the ordinary water boiler.

Mr. DAVIS.—They were about 12 inches by five feet.

Mr. LILLICK.—They were circular?

Mr. DAVIS.—Yes.

Mr. LILLICK.—Then that was the diameter.

Mr. DAVIS.—Yes.

Mr. LILLICK.—Mr. Kruger, will you point out on the house how far those water-tanks extended?

Mr. KRUGER.—They were pretty close to the end of this house, on both sides.

Mr. BELL.—How high did they stand?

Mr. KRUGER.—About 18 inches; they had a piece underneath so as to keep them off the canvas.

Mr. LILLICK.—Will you indicate where the end of the hawser was made fast to the mast?

Mr. KRUGER.—Made fast right here, right underneath here.

Mr. LILLICK.—I call your attention to what is apparently a water barrel on the starboard side of the mast; was that here on this side? [218]

Mr. KRUGER.—The water barrel was on this side, away from the mast, in here.

The COURT.—Where did the hawser pass over the stern?

Mr. KRUGER.—It passed from the mast right over the stern, here.

Mr. LILLICK.—What are these two metal contrivances?

Mr. KRUGER.—They are the leads for the winch hauling in the line.

Mr. LILLICK.—Those were not on the "Three Sisters" at that time?

Mr. KRUGER.—Yes, they were on the "Three Sisters" then.

The COURT.—Where were these men playing cards?

Mr. KRUGER.—Right over there, in this space right here.

Mr. LILLICK.—Were they in front of this bitt?

Mr. KRUGER.—Yes.

Mr. LILLICK.—You have spoken of the sea coming quarterly; will you explain which direction from where these men were the sea was coming?

Mr. KRUGER.—It was coming right on this side.

The COURT.—That is the only way it could come on the course as he described it.

Mr. BELL.—Captain, there was no flagpole here at that time, was there?

Mr. KRUGER.—No. We carry no flagpole when we are towing.

Mr. BELL.—And that tow-line had nothing there to hold it in one place?

Mr. KRUGER.—No, sir.

Mr. BELL.—The men were playing cards on the starboard side, here, were they?

Mr. KRUGER.—Yes.

Mr. BELL.—About how far from the rail? [219]

Mr. KRUGER.—Just about where Mr. Carlsen is standing now.

Mr. BELL.—About a foot and a half or two feet from here?

Mr. KRUGER.—Yes.

Mr. BELL.—What were they playing on?

Mr. KRUGER.—On the deck.

Mr. BELL.—Sitting on the deck?

Mr. KRUGER.—Yes.

Mr. BELL.—Playing cards on the deck?

Mr. KRUGER.—Yes.

Mr. BELL.—Four men?

Mr. KRUGER.—Yes.

Mr. BELL.—Two were sitting on this side, were they?

Mr. KRUGER.—I don't know; I couldn't tell you where they were sitting.

Mr. BELL.—Captain, this hatch was covered, wasn't it?

Mr. KRUGER.—Yes.

Mr. BELL.—And nobody could be down in there at that time, could they?

Mr. KRUGER.—No.

The COURT.—This is the only entrance to the engine-room, is it?

Mr. KRUGER.—Right here is the entrance. I was standing here at the time of the accident; Anderson was standing here at the wheel. This is the control to put the boat neutral, or to go ahead, or to back up. You can look out from here, you can look right in back. I could not see the men very well sitting down on the deck, but you can see what is beyond.

Mr. LILLICK.—Referring to the two men who were talking to Anderson, where were the two men standing to whom Anderson was talking? [220]

Mr. KRUGER.—They were standing right here; Mr. Anderson was there at the wheel.

TESTIMONY OF WILLIAM CARLSEN, FOR CLAIMANTS.

WILLIAM CARLSEN, called for answering claimants, sworn.

Mr. BELL.—Q. You were one of the men who were injured? A. Yes.

(Testimony of William Carlsen.)

Q. Do you remember, Mr. Carlsen, where the stuff was stowed on board here when you came aboard?

A. Yes, I do. I was the last man to come on the boat. I was phoning. After I got the office then I went to the boat and the boys had loaded all the stuff on the boat. I had ten steel cots and ten mattresses, and two tents, and a cooking stove, and a lot of cooking utensils, such as pots and pans, and stuff like that. The dishes were all boxed up. The stove was standing right here, and the cots were here, and the suitcases and the tents were on the side. All the blankets and bundles and suitcases were piled up on that side. The mattresses were piled across the sky-light on top of the pilot-house. This side from the pilot-house was open. This side was entirely blocked.

The COURT.—Q. Was there anything piled between the companionway and the bow?

A. The stove was up in there; I could not say exactly where it was. The cots were on both sides of this hatch.

Q. Both port side and starboard side?

A. Yes, sir.

Mr. BELL.—Q. What kind of cots were they?

A. They were about six feet long and about three feet wide. We had ten of them. They were folding cots

Mr. LILLICK.—Q. Is it your testimony that more than one iron cot was on the starboard side between the rail and the [221] *rail and the* companionway?

(Testimony of William Carlsen.)

A. The cots were piled up on both sides; how they were split up I cannot say; there might have been four on one side and six on the other; I did not count them as I came on; I stepped on them, I know; I got on on this side.

The COURT.—Q. You mean between the companionway and the port rail?

A. Yes, sir; I got on right on this side. We had a ladder here from the Booth Company's wharf, and I got on here, and I stepped on the cots; they were piled up against the rail on both sides.

Q. What kind of cots were they?

A. They were six feet long; as to width, I should judge about three feet; I could not say for sure, because I never measured them. They were cots the legs of which fold under.

Q. Iron standards? A. Yes, iron standards.

Mr. LILLICK.—Q. Are you sure that the stove was in front, here?

A. The stove was up in front, here; as to the exact place, I cannot say. All this space was covered up.

Q. How do you happen to fix the stove as being here?

A. I didn't fix any of it; it was on the boat when I got on. I was the last one on the boat; they waited for me for fifteen minutes while I got the office on the phone.

Q. Do you not remember that the stove was back of your boxes on this side, right by the circle where the winch now is?

(Testimony of William Carlsen.)

A. No. When I came aboard the stove was up here. Of course, whether they changed it, or not, afterwards, I do not know. I was back there all the time. I was never up as far as the pilot-house.

Q. When you came on board, you came on by the bow, did you, at the port side? A. Yes.

Q. And stepped across the cots to the alley-way, on the starboard [222] side and walked back to where you subsequently were playing cards?

A. We were right here at the corner where that barrel was standing. I think the barrel was standing on this side. They had a pump at that time where the barrel is now. That is as near as I can remember it. I am pretty sure the barrel was on that side.

Q. And from then on you remained on the after end of the boat?

A. I was aft of the engine-house all the time. This side was entirely closed up with baggage and suitcases.

Q. You mean the port side? A. Yes, sir.

The COURT.—Q. Now, Mr. Carlsen, there is the starboard bitt? A. Yes.

Q. You men were sitting about forward of that starboard bitt?

A. I was sitting about where I am standing now.

Q. That is, about two feet forward of the starboard bitts?

A. About two feet, two or three feet.

Q. Where were the other men sitting?

(Testimony of William Carlsen.)

A. One over here, one there, one here.

Q. You were all in a group in a sort of a corner from the starboard bitt to the starboard corner of the after end of the hatch?

A. I couldn't say exactly as to that.

Q. But about in that locality?

A. Yes. We had not been there very long. I don't remember playing cards. I was knocked unconscious when the line hit me. I don't remember anything about that. It must be so, because my own men told me that that was what we were doing.

Q. The four of you were sitting on deck?

A. Yes, we were all sitting on deck. [223]

(The taking of testimony was resumed in court at 11:00 A. M.)

Mr. LILLICK.—Your Honor, the man whom I asked permission to put on out of order yesterday is not here this morning and will not be here until three o'clock this afternoon; will that inconvenience the Court or counsel to have him take the stand then?

Mr. HEIDELBERG.—No, I don't think so; we can go ahead.

Mr. LILLICK.—Thank you.

TESTIMONY OF CHARLES KRUGER, FOR CLAIMANTS (RECALLED).

CHARLES KRUGER, recalled for answering claimants.

Mr. HEIDELBERG.—Q. Captain Kruger, will you step down here in the presence of the Court; you see here two swivels, do you not? A. Yes.

Q. Will you pick out from those swivels and show the Court which type of swivel it was that you used or had furnished you on this voyage in question with the "Three Sisters"?

A. This is the swivel we used, the type of swivel.

The COURT.—That had better be identified.

Mr. HEIDELBERG.—We can have it marked as an exhibit.

The COURT.—Yes, let it be marked Claimant's Exhibit "A."

Mr. HEIDELBERG.—Q. Captain, calling your attention to this swivel, Claimant's Exhibit "A," I will ask you if you see any difference in that swivel and the swivel that you used on that occasion, if you can tell us of any difference?

A. No difference at all. We had the thimble on one end, and the other two on the other end; the cable was made fast.

Q. Calling your attention, Captain, to the bolt in the center of Claimant's Exhibit "A," I will ask you if that was the same kind of a bolt that was present in the swivel that you used? [224]

A. I could not swear to that.

(Testimony of Charles Kruger.)

Q. I say the same kind, the same type?

A. Yes, the same type.

The COURT.—The record does not show where Claimant's Exhibit "A" came from.

Mr. HEIDELBERG.—I believe it will be stipulated that this was furnished as an exhibit of the Crowley Launch & Tugboat Company's swivels, will it not?

Mr. LINGENFELTER.—No, it was not. I picked that up at Crowley's. That was a worn out swivel which they had in their office and which they said would illustrate the swivel they used in their business.

Mr. HEIDELBERG.—I think that Willie Figari's testimony is pretty emphatic and clear on that point.

The COURT.—Well, the description of it shows what it is. It is a swivel with two thimbles on the bridle end and a single thimble on the hawser end, with the bolt free and not forged as a part of one of the parts of the thimble.

Mr. LINGENFELTER.—And with two bearing surfaces, instead of one.

Mr. HEIDELBERG.—Yes, that is it.

Mr. LINGENFELTER.—This is the type that they use. Of course, Crowley's have them larger and smaller.

Mr. HEIDELBERG.—Q. How did you have your tow-line made fast to this large thimble?

A. The rope went through the eye, there, and

(Testimony of Charles Kruger.)

ran through the thimble, and we made a bow-line knot.

Q. In other words, you passed the tow-rope around this thimble and then tied it where the two ends join, I mean where the one end joins the continuous part of the tow-line? A. Yes.

Mr. LILLICK.—Q. When you say that this thimble was exactly the same as the thimble that was used on that occasion, [225] are you having in mind the question of whether it was iron instead of galvanized iron or wrought iron instead of plain iron? A. It was galvanized iron.

Q. Which was galvanized iron?

A. The thimble was.

Q. I am asking you whether the appliance as a whole, covering the links on each end, the bolt and the thimble, of the one that was used on this occasion, was it galvanized, or wasn't it?

A. It was galvanized; I am pretty sure of that.

Q. As to the thimble attached to the end that was used by you on that occasion to put the hawser through, was the link larger or smaller than the link on this exhibit which we are now looking at?

A. I could not swear to that whether is was larger or smaller.

Q. Would a seven-inch hawser go through that link before you, in your opinion? A. Yes.

Q. This exhibit which you now as a whole see before you, is it as large or larger than the one that was used by you on the "Three Sisters" on the occasion when the bridle broke?

(Testimony of Charles Kruger.)

A. I could not swear to that; I could not say whether it was larger or smaller.

The COURT.—Does the size of it make any difference in this case?

Mr. HEIDELBERG.—I don't think so.

Mr. LILLICK.—No, your Honor, I don't think it does.

The COURT.—The accident was caused by the parting of the steel or iron cables of the bridle.

Mr. LILLICK.—The only thing I had in mind was this: This was simply brought in as a sample of the mechanical arrangement, and not as a sample of the one that was used; and this, not being galvanized, and as I understood the testimony the [226] other one was galvanized, I wanted that clearly in the record. That is all.

Mr. HEIDELBERG.—Q. Captain Kruger, will you swear now you examined the bolt of the swivel you used, and that you know it was galvanized?

A. I didn't examine it.

Mr. LILLICK.—Q. Upon what do you base the statement you made that the one that you had at that time was galvanized?

A. I am pretty sure that the swivel that we had was galvanized.

TESTIMONY OF WILLIAM CARLSEN, FOR CLAIMANT (RECALLED).

WILLIAM CARLSEN, recalled for answering claimant.

Mr. HEIDELBERG.—Q. What is your business, Mr. Carlson?

(Testimony of William Carlsen.)

A. Pile driver and bridge builder.

Q. For how many years?

A. Since 1901 in San Francisco.

Q. What is that business, what do you do in that business?

A. I run pile-drivers and build docks and build bridges, and all such things as that.

Q. Are you called upon in your business to handle steel cables? A. Quite a lot, yes.

Q. And hemp rope?

A. Yes, lots of hemp rope.

Q. And you have been handling hemp rope and wire cables for how many years?

A. Well, ever since I was able to work. I have not done anything else but that. When I started out I was a sailor, and since then I have been a pile driver and bridge builder. In all my work I have handled rope all the time.

The COURT.—Q. Those cables are usually made of wrought iron, rather than steel, aren't they?

A. They call them flexible steel. I don't exactly know how they are made, as I never had anything to do with the making of cables.

Mr. HEIDELBERG.—Q. Getting right down to the meat of this [227] case, Mr. Carlson, when did you first see Barge No. 61?

A. Barge No. 61 I seen at the bulkhead at Pier 46, on the inside of the bulkhead at Pier 46, between the Pope & Talbot lumber yard and Pier 46.

Q. When?

A. That was on Monday, the 7th of May. I

(Testimony of William Carlsen.)

was down there then. They were loading some piles on the barge at that time. I was not working there at that time; I went to work in the tool house the following day, on Tuesday, the 8th, I think it was, if that date is right, and loaded up some pile-driving material in the Healy-Tibbitts yard on Bay street, to be taken down to this barge and loaded on it. All I did then was to send it down there, and it was loaded by a derrick barge that was down there then. They were put on Barge 61. I had nothing to do with the loading of the barge, except on the very last day, the afternoon of Wednesday the 9th.

Q. When you speak of the last day, Mr. Carlson, just what do you mean by that?

A. The last day that the barge was in San Francisco.

Q. What happened to the barge after that, what happened to it immediately after that, if you know?

A. The barge left the bulkhead at or around, I think it was about five o'clock.

Q. Well, you know that it left the bulkhead, do you?

A. It left the bulkhead that afternoon at five o'clock to be tied up at Pier 23.

Q. Did you meet anybody down at Pier 46 on this last day that you speak of? A. Yes.

Q. Who did you see down there?

A. I met a gentleman, I can't think of his name; I thought first he was Paladini, but I was mis-

(Testimony of William Carlsen.)

taken. He is a little red-headed fellow; I would know his name if you can mention it to me. [228]

Q. Was it Del Pavero?

A. Del Pavero is the gentleman. He was talking to me at the time about when the barge would be ready, and I told him that it would be ready that evening to go. We were talking for a few minutes, and along came Paladini, himself.

Q. Which Paladini?

A. I think it was Alec Paladini. Mr. Horton introduced him to me as Alexander Paladini.

Q. What conversation did you have at that time?

A. We were standing there talking about leaving on that barge and getting her ready. Horton asked me if I would have everything on it and ready to go that night, and I said I would. He said, "Can you get your men to go down to Pier 23 to-morrow morning at six o'clock and go out with this barge, with the towboat that takes the barge out?" and I said I thought so.

Q. This was all in the presence of Alex Paladini?

A. That is all in the presence of Alex Paladini. So we worked along. Mr. Paladini and the other party split up, I don't know where they went, they went to their office, I presume. Anyway, around about a quarter after four I went over to the office to get the money for the boys who had been with me in Sacramento for Healy-Tibbitts. While I was over there the phone rang. Martin Brown answered the phone.

(Testimony of William Carlsen.)

Q. Who was on the other end of the phone, if you know?

A. That I could not say, what man it was, but it was somebody from Paladini's office, in regard to this tow, and they were trying to persuade Martin Brown then to get his fellows to come down and go on the boat at—

Mr. LILLICK.—Now, just a minute. Apparently this is hearsay. After I find out what it is he heard Brown say I will move to strike it out. In what he is saying now, however, he is starting to give his conclusions. [229]

Mr. HEIDELBERG.—Q. How do you draw the conclusion, that is, how do you know that the conversation was held from Paladini's office?

A. I was standing right alongside of the phone, and Martin Brown was consulting me about what was said over the phone. He was asking me if I could get my men to come down there at three o'clock in the morning, that that is what they wanted over the phone. I said, "No, I, for one, will not go down at three o'clock in the morning if they never build the dock at Point Reyes."

Q. What reason have you to believe that the conversation over the phone with Martin Brown and some other party was with somebody from Paladini's office?

A. I didn't say it was from their office; whether it was from their office, or not, I don't know; they might have been out of the office, they might

(Testimony of William Carlsen.)

not have been in their office when they were phoning.

Q. Did you hear Martin Brown in that conversation speak to anybody by name over the phone?

A. No; he told me that Paladini's office wanted us to come down there at Pier 23 at 3:00 o'clock in the morning instead of 6:00 o'clock in the morning, which I absolutely refused to do on behalf of my men.

Mr. LILLICK.—We ask that that go out on the ground that it is hearsay and not connected with Paladini's office or anybody else.

The COURT.—Yes, let it go out.

Mr. HEIDELBERG.—I cannot connect that up.

Q. But you did have a conversation with Paladini about the men being down there at six o'clock in the morning? A. Yes, that was all agreed.

Q. Mr. Paladini was right there all the time, was he?

A. Yes, Mr. Paladini was right there and also this other [230] gentleman he introduced to me as the man who was to be in charge of the work.

Q. And that conversation took place between yourself, Mr. Horton, Mr. Del Favero and Mr. Alexander Paladini, did it? A. Yes, sir.

Q. How did you go to Point Reyes the first time?

A. It was arranged in that telephone message, Brown arranged it—

Mr. LILLICK.—Now, pardon me, I ask that that go out.

Mr. HEIDELBERG.—That may go out.

(Testimony of William Carlsen.)

Mr. LILLICK.—That will go out, will it, your Honor?

The COURT.—Yes, that will go out.

Mr. HEIDELBERG.—Q. How did you go over to Point Reyes the first time?

A. We went over on the "Corona" the first time.

Q. And when you went over to Point Reyes you went over for that purpose?

A. We went over to build that dock.

Q. For whom? A. For Mr. Paladini.

Mr. LILLICK.—We ask that that go out, your Honor, "for Mr. Paladini." I should have objected to the question in the first place. I did not assume that the witness was going to answer that he was going there to do the work for Paladini. The question is, who was this witness employed by.

The COURT.—But he didn't say that. He said the wharf was built for Mr. Paladini. There is no question about that, is there?

Mr. LILLICK.—None at all, your Honor, I withdraw the objection.

The COURT.—He doesn't say he was employed by Mr. Paladini.

Mr. HEIDELBERG.—Q. How long were you in constructing that wharf?

A. The whole time was—the barge got up there on the 10th of May, between 4:30 o'clock and 5:00 o'clock in the afternoon, and we left there on June 8th around 3:30 *in the* [231] *wharf* had been finished at that time, and the pile-driving.

(Testimony of William Carlsen.)

Q. All the time you were building this wharf, did you remain at Point Reyes?

A. No, I came home week-ends and went back on Monday morning.

Q. What did the other men do during that time?

A. Two of them stayed over there, and the remainder of them came home.

Q. How did you come home to San Francisco during those various times? A. On Paladini's boats.

Q. How did you go back upon the various times you went back? A. On Paladini's boats.

Q. Did you have any conversation with the captains when you would be coming over, say on Saturdays, as to what time you would be going back?

A. He always used to ask me, "What time do you want to leave Monday morning?" On Saturday he would always ask me what time I wanted to go back Monday morning.

Q. And then would you find the boat waiting for you there on Monday morning?

A. Every Monday morning, yes.

Q. Can you tell us what boat it was you traveled back and forth on?

A. Well, it was about fifty-fifty, with the "Three Sisters" and the "Corona." The first time we went up on the "Corona"; we came back on the "Three Sisters." He landed us then down at Pier 41, down at Healy's rock bunkers. Two times after that we came back on the "Three Sisters" from Point Reyes. I think we went up more on the "Three Sisters" than we did on the "Corona."

(Testimony of William Carlsen.)

Q. But you have no absolute knowledge at this time of just how many times you traveled back and forth on any particular boat?

A. No, I could not say to the exact number of times. I should say about half and half on each boat.

Q. During the time you were up there with your crew, were you [232] furnished with water and supplies? A. Yes.

Q. Who furnished you with the water and the supplies?

A. The "Three Sisters," first; then the "Three Sisters," I believe, went down to Monterey, or some place, and then the "Corona" took its place for a while. When one boat was out of town the other one attended to us all the time. We had water for the boilers and stuff like that all the time.

Q. When did you see the "Three Sisters" on this last voyage up there; how long before June 8th was it?

A. It was on June 6th, around noon time, I think; whether it was right before dinner or right after dinner I would not be sure.

Q. Where were you standing at that time?

A. I was on top of the dock.

Q. Who was with you?

A. Practically all the men were around there in the neighborhood, because we had finished the dock all the way out to the very end. The captain came over with lumber on top of his boat, the "Three Sis-

(Testimony of William Carlsen.)

ters," the lumber that was to finish the last end of the dock.

Q. Did the captain say anything to you as he drew alongside of the wharf? A. Yes.

Q. What did he say to you at that time?

A. He hollered up to me and asked me what time I would get finished. I said, "It will take a couple of days, Cap." He said, "I got orders from Paladini to stay here and wait and take you fellows home."

Q. Then what happened to the "Three Sisters" after that?

A. He left and went over to a fish barge that they had over there, a barge with a big house on it. I think it was also Crowley's barge. He tied up alongside of that barge, and he lay there and waited until the last day, and then he came back alongside for us. [233]

Q. Did you have any conversation with him on the Saturday, after you had finished the job?

A. Yes. We had it all arranged the captain was to—

Mr. LILLICK.—Now, just a minute, I object to that.

Mr. HEIDELBERG.—Q. Just give what conversation you had, if any. Did you have any conversation at that particular time that you now remember?

A. Yes, I remember making arrangements with the captain—

Mr. LILLICK.—Now, just a moment.

(Testimony of William Carlsen.)

Mr. HEIDELBERG.—Q. Don't say that you made arrangements, Mr. Carlsen, because that calls for your conclusion as to what the arrangements were. State what you said to him and what he said to you, if you remember it; if you don't remember it exactly, give the substance of it.

A. He came alongside the barge and took us up to the dock. We had no way of getting off the barge. The barge was tied up with anchors. We had a skiff over there, a rowboat, and we had to hoist that up on the barge. The only way we could get off the barge was by Paladini's boat. He came alongside of the barge and waited for us until we heaved up. Then he took us on the boat up to the F. E. Booth Company's dock.

Q. What did you do then?

A. I went in the F. E. Booth Company's house and used their phone to phone to Healy-Tibbitts that we were coming home.

Q. Where were the rest of the men at that time when you were telephoning?

A. The rest of the men at that time were loading the cots and the cooking utensils, and the blankets, and the mattresses, and all that stuff, on the boat.

Q. I call your attention to Mr. Davis, who is sitting here in the courtroom, and I ask you if you ever saw him before you [234] saw him here the other day in the courtroom?

A. I seen him once next to the last day I was over there. He came over there to Point Reyes.

(Testimony of William Carlsen.)

Q. Did you have any conversation with him at that time?

A. I told him that the captain was laying over there waiting for me, that he said he had orders to stay there and wait for me. He came over on the "Corona" after some fish.

Q. Did you tell him anything about how you were going to go back to San Francisco?

A. I told him we were going back with the "Three Sisters" that was waiting for us there.

Q. What, if any, remark did he make to that?

A. None that I can remember of. I didn't know who the gentleman was at that time, myself, and so I didn't have much conversation with him. He wanted to get the dimension of a band that was to go around a pile over there that was to be used as mast to put a boom on to sling fish on to the dock.

Q. After you finished your conversation with the Healy-Tibbitts office from the telephone at Booth's Wharf, what did you do?

A. I then went on the boat.

Q. When you went on the boat, what boat do you mean? A. The "Three Sisters."

Q. Were you ever on the barge at any time?

A. Not after that, no.

Q. Who else, if anyone, boarded the "Three Sisters" with you?

A. Me and the cook remained on the "Three Sisters," that I know of.

Q. At the time you boarded the boat, was your camp equipment on board? A. Yes.

(Testimony of William Carlsen.)

Q. And also the men's clothing and supplies?

A. Yes.

Q. Did you ask the captain for permission to board the "Three Sisters" on that day?

Mr. LILLICK.—That is objected to as leading. [235]

Mr. HEIDELBERG.—It is in rebuttal, your Honor.

The COURT.—I will allow it.

Mr. HEIDELBERG.—Q. Did you ask the captain for permission to come back on the "Three Sisters" upon that Saturday?

A. I didn't ask him no permission; I had an invitation to come on board. He plainly told me that that is what he was there for—to take us home.

Q. Did you hear any of your men ask the captain for permission to come aboard the "Three Sisters" and be transported to San Francisco?

A. No, sir.

Q. When you boarded the "Three Sisters," where did you go?

A. I boarded her on the bow, and then I walked right aft on the starboard side to the back end of the engine-house, and I remained at the back there all the time that I was on the boat, until the accident.

Q. Did you have any conversation with the captain at any time while you were on board the "Three Sisters," in which he told you of any specific part of the boat that you were to occupy?

A. No, sir, absolutely not.

(Testimony of William Carlsen.)

Q. Did he at any time during that voyage warn you about being in any particular position or location on that boat? A. No, sir.

Q. When you were at the stern of the boat, did the captain visit you back there; was he there with you at some time?

A. Yes, he was back there several times. I got three small salmon trout and—

Q. I was just going to ask you about that. What did the captain do, if anything, while you and your companions were on the back of the boat? I will withdraw that question for a moment. Who was with you in the stern of the boat?

A. It was Sauder and Reed, and a fellow by the name of Fred [236] Woods, the cook we had over there and myself, and Ed Rowe was also in back there. There were five of us back there then.

Q. Did you hear the captain say anything to any one of those men about any position or location they were to assume on this boat? A. No, sir, never.

Q. Did you hear him say anything to those men in your presence or in your hearing about it being dangerous to be in any part of that boat?

A. No, sir.

Q. Now, you say the captain came back there and was with you at the stern of the boat for a while?

A. Yes, sir.

Q. What, if anything, did the captain do while he was back there?

A. I got three small salmon trout from the fellow in charge of the F. E. Booth Company's dock the

(Testimony of William Carlsen.)

night before, and I took them on there, and I had them lying on the hatch; the captain said, "Wait a moment and I will clean them for you, because I am an expert at that." He came back there and was sitting on the hatch cleaning the fish for me while the boat was on the way.

Q. Do you know who was steering the boat at that time?

A. At that time Scotty Evans was on the boat.

Q. And was he steering the boat?

A. Yes, he was steering the boat; he was in the pilot-house at that time.

Q. And this cleaning the fish incident happened when, was it while you were on your way to San Francisco?

A. Yes. We had been out I should judge about half an hour, or a little over, or such a matter as that; I could not say exactly to the minute, because I didn't time it.

Q. After you started out from Drake's Bay, did the captain at any time make any change in the length of the tow-rope? A. Yes.

Q. Did you notice the distance at any time that existed between [237] the barge and the "Three Sisters"? A. Yes, I took notice of that.

Q. What would you say, Mr. Carlsen, based upon your experience and what you saw there at that time, was the extreme length or distance that separated the barge from the "Three Sisters" at any time during that voyage?

(Testimony of William Carlsen.)

A. The very extreme, as near as I can judge, would be about 180 feet.

Q. And that includes, of course, the length of the tow-line out and also the bridle?

A. Yes, the distance between the boat and the barge.

Mr. LILLICK.—Will you be good enough, Mr. Heidelberg, not to be quite as leading in your questions as you were in that last one?

Mr. HEIDELBERG.—Q. What does that distance include?

A. It includes the distance between the barge and the tugboat, including the bridle and the rope.

Q. Where were your men when you first started out from Point Reyes? When I say "your men," I mean with the exception of yourself and the cook. Where were the rest of the men? You testified that you were on the boat. Where were the rest of the men when you first started out?

A. One of them was in back of the pilot-house—there is a little narrow galley there, and he was in there shaving himself.

Q. I don't think *I* understand me. I mean when you first started out from Drake's Bay, from Point Reyes, at the very beginning; were some of your men on the barge?

A. We were all on the boat first; some of them had to go on the barge in order to get the barge going. They had to go on the barge in order to pick up the anchors.

(Testimony of William Carlsen.)

Q. I understand that you were first on the boat to be transported [238] over the wharf.

A. Yes; this is the way it was. First, in the boat over to the wharf; then from the wharf to the barge —that is, from the wharf back to the barge to get on the barge.

Q. What happened to your men then?

A. Some of them went on the barge; the engineer, and I think four men went on the barge and picked up the anchors. After the anchors were picked up the captain went very slow with a short tow-line, I should judge around 50 or 60 feet, including the bridle and all, for about 15 or 20 minutes, until we were pretty close to the bell buoy, there; then he backed up and took the men on the boat, because I had arranged with the captain to—

Mr. LILLICK.—Now, just a moment, I object to his saying what was arranged.

Mr. HEIDELBERG.—Q. Don't say you had arranged with the Captain, say just what was said.

A. We had talked it over, me and the captain, if my cook could use his stove to cook some coffee for the men on the boat after we got started, because we broke camp in the morning and we had nothing to eat that day; so we asked him as a favor if after we got on the boat my cook could use his stove to cook coffee for the men, and he said, "Certainly." When the cook got on the boat he cooked coffee and when the men came on the boat again after they got the anchor up and the ropes coiled up so that if we did come into town in the dark they would know where

(Testimony of William Carlsen.)

to find the ropes to tie her up; then we all stood around the engine-house in a row and had our coffee.

Q. After that what did you do?

A. After that we were on the back end of the boat, back of the pilot-house. Then after that the captain cleaned the fish for me. Then, as I heard afterwards, we commenced to play cards. I don't remember anything about that. [239] We didn't play cards very long, because I don't remember anything about it.

Q. Did the captain go below into the engine-room at any time during this voyage? A. Yes, sir.

Q. And when he came back from there—I presume he did come back—did he make any remark to you at any time concerning the speed of this boat?

A. He asked me, "How do you like the speed of her now"—when he came up over the galley. What he meant I don't know.

The COURT.—Q. Do you mean the galley?

A. I mean the hatch, on top of the engine-house.

Mr. HEIDELBERG.—Q. Did you ever notice the speed of the boat diminish after that particular incident? Did he slow her down, as far as you know?

Mr. LILLICK.—Which is the question, did you ever notice, or did he slow it down?

Mr. HEIDELBERG.—I will withdraw the question.

Q. Did you notice any change in the speed of the boat after that time?

A. Yes, he speeded her up.

Q. When did he speed her up?

(Testimony of William Carlsen.)

A. He had just done it before he came up from the engine-house.

Q. And was it then he made the remark to you, "How do you like the speed"? A. Yes.

Q. Then after that did you notice any change in the speed of the boat?

A. No, sir; in fact, that was the last I remember on the boat; that is the last word I heard anybody speak on the boat, the captain asking me how did I like the speed. I don't know how long after that the accident was. That is the last I remember.

Q. You know Willie Figari, of Crowley's, do you not? A. Yes. [240]

Q. Did you meet Willie Figari after this accident at any time?

A. I went down there, it has been about four months ago, or such a matter.

Q. Did you have any conversation with him at that time regarding the swivel?

Mr. LILLICK.—Now, just a minute—

Mr. HEIDELBERG.—Answer "Yes" or "No."

A. Yes, I did.

Mr. LILLICK.—Just a moment, Mr. Carlsen, when I object, please wait until I make my objection. I ask, if your Honor please, that the answer be stricken out, so that I can object.

The COURT.—Let it go out.

Mr. LILLICK.—We are now on the threshold, apparently, of a conversation with Willie Figari. He certainly would have no right to bind A. Paladini, Inc. The only purpose of such a conversation

(Testimony of William Carlsen.)

could be to introduce evidence that would be binding upon them. We object to the evidence upon that ground.

The COURT.—I think, Mr. Lillick, that this conversation which counsel is now seeking to elicit was asked of Mr. Figari on his cross-examination with reference to the condition of this bridle or the swivel. As I remember it, he said he could not remember any such conversation.

Mr. LILLICK.—Is that the purpose?

Mr. HEIDELBERG.—Yes, that is the purpose.

Mr. LILLICK.—We will withdraw the objection.

Mr. HEIDELBERG.—I wish to make a statement to your Honor in that regard. I do not like to impeach any witness, and, furthermore, I do not like to impeach a witness when it necessitates that I take the stand. It is only just for the purpose of making good with the Court that I am putting this in, to [241] show that we did have this conversation, and that my questions to Mr. Figari were not mere bluff.

The COURT.—You are entitled to it.

Mr. HEIDELBERG.—Q. What conversation did you have with Mr. Figari at that time?

A. I went down there for the sole purpose of asking him to see the bridle that came back, the wire, I wanted to see the wire that had broke. He said that he didn't have it. I asked him if he thought Paladini had it, and he said, "No," he didn't think so. I said, "Didn't you settle up with him, or something?" He said, "Well, Pala-

(Testimony of William Carlsen.)

dini paid for a bridle." Whether he knew what he was talking about, or not, I don't know, but that is the very word he said to me. So he took me out and showed me a bridle, which was a ¾ bridle, something similar to that, there, lying on a boat. I asked him at that time if he does towing on the outside with that kind of stuff, and he says, "No, we use them bridles in the bay, we don't never do any outside towing with these bridles."

Q. Did you have a conversation with Mr. Figari in my presence at the Crowley Launch & Tugboat Co's. office on last Monday? A. Yes, sir.

Q. Just give what that conversation was.

A. I heard you ask Mr. Figari who wanted the bridle, and he told you that Martin Brown phoned to him about the bridle on behalf of Mr. Paladini.

Q. Did you hear him say anything at that time as to whether or not he knew for what purpose or use this was to be put?

A. I heard him say that if he had known what it was to be used for they never would have got it.

Q. When you were on the stern of the "Three Sisters," can you tell whether or not you noticed how the tow-rope was fastened to the "Three Sisters"?

A. The bight of the line [242] was fastened to the mast.

Q. You say the bight of the line was fastened to the mast? A. Yes.

Q. As I understand it, that means there was some rope left over? A. Yes, sir.

(Testimony of William Carlsen.)

Q. And where, if you noticed, was the balance of the rope located?

A. It was coiled right in back of the mast, toward the port side.

Q. How high was that coil of rope, would you say, just state from your best knowledge and your remembrance of it?

A. Well, approximately from a foot to eighteen inches, here. It is pretty hard to state exactly the height of the coil—say around 15 inches.

Q. Could you tell how big around in circumference it was?

A. It was about 3 feet 6 or 4 feet in diameter.

The COURT.—Q. Was it a tight coil, or was there a space in the middle of it?

A. There was a space in the middle of it.

Mr. HEIDELBERG.—Q. How much rope would you say, from your experience in handling ropes, was in that coil of rope that was on the deck?

A. I would call it on an average of 225 to 250 feet.

Mr. HEIDELBERG.—That is all.

Cross-examination.

Mr. LILLICK.—Q. How do you make that average of 225 to 250 feet?

A. By my experience that I have had in dealing with rope.

Q. Explain the mental process that you use in saying it was 225 to 250 feet in that coil?

A. Well, when you coil it up, and you have a 3½-foot diameter, you have a little over three

(Testimony of William Carlsen.)

times that much in circumference; when you get one strand and average up the number of strands that are there, you can guess by that how much rope you have there.

Q. When did you make that computation first?

A. Right after [243] the rope was made fast, after the captain lengthened it out from 50 feet to 180 feet, approximately.

Q. You looked at it and said, "Well, there is about 225 to 250 feet of rope there"? A. Yes.

Q. And that was while you were out there, was it, and before the accident happened?

A. Yes, sir.

Q. You are quite sure about that, are you?

A. Yes, sir.

Q. As to the place where the bight was—

The COURT.—Q. How many coils would you say there were there?

A. Oh, I should judge around from 20 to 25 turns were lying around there.

Mr. LILLICK.—Q. By that you mean there were 25 strands of rope?

A. Coiled around in that circle, yes.

Q. How wide was the rope out. When you say from 3½ to 4 feet, do you mean the outside?

A. I mean the outside of the circle, yes.

Q. What drew your attention to the rope that day?

A. Well, I couldn't help seeing it, I was right there by it.

Q. Did you think that the rope was too short?

(Testimony of William Carlsen.)

A. I didn't know anything about it.

Mr. HEIDELBERG.—Just a moment. That is objected to as calling for the conclusion of the witness.

Mr. LILLICK.—I have a right to call for it; he is an expert on this subject.

Mr. HEIDELBERG.—He is not an expert on towing, though.

The COURT.—He says he didn't know anything about it, and so that ends it.

Mr. LILLICK.—Q. Where was the rope coiled with relation to the mast?

A. It was aft of the mast, on the port side of the hatch; it was back of the water barrel. They had a big [244] water barrel standing on the port side of the hatch at that time, and in back of that was this coil.

Q. Was it on the hatchway, or in the alley?

A. Right off the hatch, right alongside the hatch.

Q. So that none of it was on top of the hatch?

A. I don't think so, no.

The COURT.—Q. Was it between the hatch and the wall?

A. Between the hatch and the port rail.

Q. Between the hatch and the port rail?

A. Yes, sir.

Mr. LILLICK.—Q. When you got on the boat at the dock, at Booth's dock, you told us down at the boat this morning that you walked from the port side, in front of the house, and then back to where you were injured.

(Testimony of William Carlsen.)

A. No, sir, I didn't walk in front of the house, I went through the alleyway, through the galley, the door was open in the galley, there, the cook was in there, and I walked right in through there and over to the starboard side.

Q. So that there was not any material piled up at the left-hand side of that door, there was a clear alleyway through?

A. There was a little space where the door could open.

Q. And how about right in front of that, was there any equipment in front of that?

A. You mean in front of the door?

Q. Yes.

A. Yes, the cots were all piled in front, and on both sides.

Q. You misunderstand me. I mean right in front of the door. Did you step down on to the deck and then through this alleyway and from one side of the galley to the other?

A. Yes, I walked right through the door.

Q. And you did not go around in front of the pilot-house at all? A. No, sir.

Q. After you went aft, did you sit down, or were you standing [245] around back there?

A. We were standing around and walking. We were standing up while we had our coffee, I remember that much, and then I was sitting down talking to the captain for a considerable length of time while he was cleaning the fish for me.

(Testimony of William Carlsen.)

Q. Didn't you sit on the rail on the starboard side while you were having your coffee?

A. Not that I remember of.

Q. Didn't you sit on the companionway, on the bitt in front of the pilot-house, while you were having your coffee? A. No, sir.

Q. You are quite sure of that.

A. Absolutely sure of that.

Q. Now, coming to the card game, how long after you started did you commence playing cards?

A. I couldn't say, because I don't remember the first thing about playing cards.

Q. Do you remember up to the time the change in the length of the hawser was made?

A. Yes, I remember up to that time.

Q. Up to that time where were you on the after deck?

A. I was between the engine-house and the stern of the boat at that time.

Q. Just walking back and forth, or were you standing up? A. Well, we were moving about.

Q. Do I understand that you remember nothing whatever about playing cards?

A. I don't remember nothing about playing cards.

Q. You don't remember starting to play cards?

A. No, sir.

Q. And, of course, you don't remember who produced the cards, or what you were playing for, or what kind of a game it was?

A. No, sir, only except what I heard afterwards,

(Testimony of William Carlsen.)

that we were playing whist; that is all I know about it.

Q. Was the hatch open?

A. The hatch was closed; I think they had a canvas over it at that time.

Q. Entirely covered over? A. Yes, sir.

Q. Was the companionway open in front of the boat, so that [246] you could go down into the forecastle?

A. I didn't take notice of that.

Q. Do you remember whether she had any flags out?

A. No, I didn't notice that. I didn't see any flags all the time I was on her.

Q. Did you notice what was on the house?

A. Some of the boys' bundles were there, besides all the mattresses were thrown right across the skylight by the engine-house, there, in back of the pilot-house.

Q. How many bunks were there? A. There were ten.

Q. And some of them were on top of the house, were they?

A. I am pretty sure all of the mattresses were piled across the engine-house.

Q. How about the bunks?

A. The cots were all up forward, the steel cots.

Q. All the cots were piled up forward?

A. Yes, all piled up forward.

Q. None of them in the alleyway, on the port side? A. No.

(Testimony of William Carlsen.)

Q. Where was the stove?

A. The stove was right up forward.

Q. You are quite sure of that?

A. I am absolutely sure it was, because I stepped on it when I got on from the Booth Company's dock.

Q. Do you know how the stove was loaded on?

A. I don't know how anything was loaded on, because I was not there, then.

Q. You had nothing to do with placing it on board? A. No.

Q. Was there anything on the after deck at all, except the water-barrel and the coil of rope you have testified about?

A. The water-barrel and the coil of rope, I think that is all that was on the port side; on the starboard side, where the water-barrel was this morning, was a pump.

Q. How much space did that pump take?

A. Not a great deal. [247]

Q. As much as the barrel?

A. No, I hardly think so.

Q. None of the men were sitting on the house?

A. No, I don't think they were.

Q. Who were the men who were playing cards with you? A. I don't know who they were.

Q. You don't know who was sitting with you on the after deck? A. No.

Q. Who was standing at the pilot-house in front talking to Anderson and the captain?

(Testimony of William Carlsen.)

A. I don't know that, either, only what I heard Haney say, that he was there.

Q. How many of the men were there altogether, in your crew, besides yourself? A. Eight.

Q. Will you place for me the positions as you remember them of the eight men while you and the captain were cleaning fish?

A. One fellow was in the galley shaving himself.

Q. How do you know that?

A. I seen him there.

Q. How could you see that man shaving himself from where you were on the after deck?

A. Well, I didn't see him shaving himself, but I saw him put lather on his face, he was outside when he was doing that.

Q. How could you see him from where you were on the after deck when he was on the port side?

A. He was in the galley.

Q. He was in the galley and not on the port side?

A. He was in the galley.

Q. You were down there this morning, weren't you? A. Yes.

Q. And did you notice the mirror on the left of the entrance to the galley, that is, on the port side?

A. No, I didn't pay no attention to the mirror.

Q. Where was the man shaving in the galley?

A. Over the sink, wherever that was.

Q. So you think there is a sink there, do you?

A. There is a [248] sink on the port side, there, and I suppose he was there shaving himself;

(Testimony of William Carlsen.)

he had a mirror in his hand; he had a hand mirror. I seen him with that. I seen a lot of lather on his face. I didn't see him shave himself, but I presume that is what he was going to do.

Q. So you saw him with a hand mirror in his hand in the galley, and you saw that from where you were in the rear, did you? A. Yes.

Q. And you are sure of that, are you?

A. Yes; I was standing up at that time.

Q. Where were you standing?

A. Back of the engine-house, right by the hatch that goes down into the engine-house. Ed Rowe was back there also at that time.

Q. Ed Rowe was there also? A. Yes.

Q. Have you talked to Ed Rowe about having seen the man shaving? A. No, I have not.

Q. You don't know whether Ed Rowe saw the man with a hand mirror in his hand, or not, do you?

A. I don't know, I couldn't say.

Q. Now, go ahead and place the others.

A. Ed Rowe was back there talking to me. The cook was leaning up against the engine-room. Phil Evans was in the pilot-house. George Reed was back there, and Sauder was back there.

Q. I asked you when you started to place the men to tell me where they were while you and the captain were cleaning the fish; you said you saw one man shaving in the galley, and then you changed your position to opposite the hatchway leading down into the engine-room; will you tell me now, after having had your attention called to

(Testimony of William Carlsen.)

it, whether you place the man shaving while you and the captain were cleaning the fish, or not?

A. I didn't pay no attention to whether the captain was cleaning the fish while he was shaving, or not. [249]

Q. Then let us go back to the time when the captain was with you cleaning the fish. Please, if you can, give me the positions of the various men that were in your gang.

A. The exact spot they were on?

Q. As nearly as you can remember it, yes.

A. They were scattered around the boat. It is almost impossible for me to tell you the exact spot each man was on.

Q. How many were on the after deck?

A. There were about five or six of us on the after deck.

Q. That would leave two; one of those was shaving; where was the other?

A. Phil Evans was in the pilot-house.

Q. Inside the pilot-house? A. Yes, sir.

Q. Are you quite sure of that? A. Yes, sir.

Q. When did the two men step out alongside the pilot-house, do you remember that?

A. No, I don't remember that.

The COURT.—We will be in recess until two o'clock.

(A recess was here taken until two o'clock P. M.) [250]

AFTERNOON SESSION.

WILLIAM CARLSEN, cross-examination (resumed).

Mr. LILLICK.—Q. You have not any very definite recollection of the events between the time you started to tow and the time of the accident, have you, Mr. Carlsen?

A. In regards to what do you mean?

Q. Any part of it.

A. No, not anything outside of what I have spoken of, that we had our coffee, and that we were walking around and talking around there until we all went and sat down back there at the place I showed you this morning. I don't ever remember leaving that place that I showed you I sat this morning.

Q. Did the cook start the fire in the galley before the launch got under way with the barge behind?

A. That I could not testify to, for I don't know.

Q. You have testified that the cook asked permission to use the galley: When did he ask that permission, if you know that?

A. The cook did not ask permission, I asked permission of the captain of the boat, myself, for our cook to use his stove.

Q. And when did you ask that permission?

A. I could not say whether it was on our way up to get the stuff, or not. I don't remember when it was. I know he gave me the permission.

(Testimony of William Carlsen.)

Q. You do remember, yourself, asking Captain Kruger whether you could use the stove?

A. Yes, sir.

Q. When you went back to the barge after loading the equipment on at Booth's, did you remain on the launch, or did you get off and get on to the barge? A. I remained on the launch.

Q. Who directed the men that put the bridle over the bitts on the barge?

A. The captain of the boat.

Q. Captain Kruger? A. Yes, sir. [251]

Q. What did Captain Kruger do about ordering your men to do your work?

A. It was not my work, sir.

Q. Where was the bridle when you got down alongside of the barge, do you remember that?

A. It was lying in the stern of the boat.

Q. Did the boat back up to the barge?

A. Do you mean when we first went to the barge after loading the stuff on there?

Q. Yes.

A. I don't quite remember whether he did, or not, at that time.

Q. Who actually placed the ends of the bridle over the bitts on the barge?

A. I don't know which two of the men it was. I could not testify to that. I don't remember which two of the men it was.

Q. You don't remember which of the two men did that, and yet you remember that Scotty Evans was in the pilot-house at one time: Is that correct?

(Testimony of William Carlsen.)

A. Yes, sir.

Q. At what time was Scotty Evans in the pilot-house?

A. Some time between the time he lengthened out the tow-line and the time of the accident. The last thing I remember, as I have already stated, on the boat, was that I seen Phil Evans in the pilot-house.

Q. In what position were you when you saw Evans in the pilot-house?

A. I was standing up somewhere around the starboard side of the boat, there; right the exact spot I cannot tell.

Q. How long was it from the time the line was lengthened until you lost consciousness?

A. I could not say.

Q. Was it half an hour or an hour?

A. I don't even know just exactly the time this thing did happen.

Q. Do you have any recollection at all of the time that elapsed between the lengthening of the tow-line and your losing consciousness?

A. Not only from what I have heard since the [252] accident; myself personally, I do not know.

Q. And what you have heard since the accident is what you testified to this morning, wasn't it?

A. How is that?

Q. And what you testified to this morning is what you heard afterwards, and not what you remember: Is not that the fact?

(Testimony of William Carlsen.)

A. What I testified to this morning is what I remember.

Q. And that is all you remember?

A. I remember all that I have testified to.

Q. Can you name the men who were on the barge when the "Three Sisters" backed up to attach on to the bridle?

A. There was not anyone on the barge at that time.

Q. Then they stepped off the "Three Sisters" and got on to the barge, did they? A. Yes.

Q. What men did that?

A. Well, I think they all went up there, with the exception of myself and the cook.

Q. Who told them to go up there? A. I did.

Q. What did you tell them to do?

A. I told them to go up there and pick up the anchors and clear up the lines a little bit so that if we did get into the city when it was dark we would have things in ship shape so that we could get the lines out to lie her up after we got here. That was the understanding.

Q. What happened after they cleared the lines up and got things in ship shape?

A. The captain backed his boat up and took them on board.

Q. When was the bridle put on the bitts?

A. Some time in the neighborhood of 3:30, I should judge, in the afternoon.

Q. Was the bridle put on the bitts after your

(Testimony of William Carlsen.)

men finished cleaning up the barge and getting things in ship shape?

A. No, sir, the bridle was put on the bitts right away after the men got up on the barge. The deck-hand handed the bridle [253] up to the men on the barge, and those two men put it over the bitts.

Q. You mean one on each end?

A. Yes, one on each end.

Q. How long have you gone to sea, Mr. Carsen?

A. I went to sea four or five years when I was a young fellow.

Q. Where?

A. All around; I sailed to Canada, England, Australia, Hawaiian Islands; mostly on windjammers.

Q. In what position? A. As an able seaman.

Q. So that for four years you were an able seaman?

A. Practically that time; it might have been a little longer than that, counting all of it.

Q. During that time you were in and about vessels, were you not? A. Yes, sir.

Q. And during that time you, on many occasions, saw towboats warp vessels out from shore, did you not? A. Yes, sir.

Q. During that time, yourself, on many occasions, made fast the lines which were used to tow a vessel, did you not? A. No.

Q. Isn't that a part of an A. B.'s duty on a vessel?

(Testimony of William Carlsen.)

A. It may be their part if they are asked to do it; I was not asked to do it, to make the tow-line fast; if I had been asked to do it the chances are I would have done it.

Q. Do you remember that during the four years experience you had before the mast that you on no occasion as a member of the crew of a vessel was not asked to catch a heaving line and haul up a tow-line and make it fast to a bitt? Is that your testimony? A. Yes, it is.

Q. When that hawser was made fast at the barge, where were you?

A. I was back on the boat some place, I don't know exactly the spot I was on; I was back of the engine-house, or around by the starboard side of the engine-house some place.

Q. Watching the performance, were you not?

A. Yes, sir. [254]

Q. When I remind you of it, do you not remember that you were standing on the grating just at the aft rail while they were fixing the bridle?

A. No, not that I can say; I do not know exactly where I was at the time they put the bridle up.

Q. You say you were not there; you don't remember where you were, do you?

A. I said I was back of the engine-house, on the stern end of the boat some place, but I don't know exactly where I was at that time.

Q. Would you go so far as to say you were not on that grating?

A. I was on that grating several times, but

(Testimony of William Carlsen.)

whether I was on it at that time, or not, I cannot testify.

Q. I understand you to testify you had nothing whatever to do with the orders that were given to the men in your gang who put that bridle on the bitt: Is that your testimony?

A. That is my testimony, I had nothing to do with handling of the bridle at all.

Q. Did you see the bridle at all?

A. Yes, enough to see that it was a wire, and that is all; I didn't pay much attention to it.

Q. Didn't you see how the hawser was made fast to the shackle at the end of the bridle?

A. No, sir, I didn't pay no attention to that.

Q. You paid no attention to that, as an old sailor man? A. No.

Q. That didn't interest you?

A. It didn't interest me, it wasn't any of my business.

Q. Had you ever worked on a towboat?

A. No, sir.

Q. How many feet would you say it is from the mainmast on the "Three Sisters" to the rail at the end of that grating aft?

A. You mean from the mast to the very end of the boat?

Q. To the very end of the boat, the stern of the boat. [255]

A. Well, that is all a guess; giving a guess, I would say about 15 or 16 feet, maybe. I didn't

(Testimony of William Carlsen.)

pay very particular attention even when I was down there this morning to that. It was something like that, I should judge.

Q. What are the dimensions of Crowley's Barge No. 61?

A. From what I have heard, it is 85 by 35.

Q. You say you have heard that? A. Yes.

Q. That is not based on your observation?

A. No. I never measured it. I only know what I have heard about that.

Q. Who told you that?

A. I think it was Mr. Heidelberg told me that Mr. Horton had told him. I think that is who it was. I am pretty sure of that.

Q. You have gone over the dimensions and distances involved in this case on several occasions before coming into court, Mr. Carlsen, haven't you?

A. No, not on several occasions. I stated the facts to Mr. Heidelberg as I am stating them now, all I remember of it, and that is all I know of it.

Q. How many times have you discussed the question of the distance between the "Three Sisters" and the barge before coming into court?

A. Once with Mr. Heidelberg. He asked me that question before he ever decided to take the case.

Q. That was the only occasion?

A. That is the only occasion.

Q. You have not talked it over with the other men who are going to testify in your favor?

A. No, sir.

(Testimony of William Carlsen.)

Q. Haven't discussed it in any way with them?

A. No, sir.

Q. You did not, before coming into court on Monday here, talk it over with Mr. Heidelberg?

A. No, not that particular thing.

Q. So you have only mentioned the length of this hawser and the distance between the launch and the barge on that one occasion when you went to Mr. Heidelberg and asked him to take the case? [256]

Q. Are you as sure of that as you are of the rest of your testimony in this case, Mr. Carlsen?

Mr. HEIDELBERG.—I object to that, your Honor, as immaterial, irrelevant and incompetent.

The COURT.—It may be, but I never tried a case where it was not asked.

Mr. HEIDELBERG.—I know that, your Honor, I never heard a case tried where I didn't hear that question asked.

The COURT.—I will let him answer it.

A. Just as near as I can remember. It was never asked me more than that once, when Mr. Heidelberg took the case.

Mr. LILLICK.—Q. How big was that stove that was loaded on the "Three Sisters"?

A. The area of the top of that stove was a little bit bigger than this table where this gentleman is writing at.

Q. Do you know whether the stove was lifted on the "Three Sisters" by a block and tackle and a boom, or was it lifted on by the men?

(Testimony of William Carlsen.)

A. I don't know anything about that.

Q. It is my recollection that you said that the stove of that dimension, and some of the iron cots, were forward of the house on the port side.

A. On both sides.

Q. On both sides?

A. Forward, on both sides, the cots were.

Q. So that your testimony now is that the cots were on the starboard side of the "Three Sisters" forward of the pilot-house, as well as on the port side: Is that correct?

A. Yes, they were divided; I don't know whether there was an equal amount, but they were divided on both sides from the capstan to the rail forward.

Q. Do you remember the little companionway leading into the forecastle?

A. You mean that thing with the little top over it? [257]

Q. Yes, the little hooded affair.

A. Yes, I remember that.

Q. Were there cots on the starboard side of that.

A. Yes, there were cots on the starboard side of that.

Q. And there were cots on the port side of it?

A. Yes.

Q. And there were cots along the port alleyway?

A. I don't know anything about that, I didn't see no cots there myself.

Q. You didn't see any there? A. No.

Q. What was there?

(Testimony of William Carlsen.)

A. Suitcases and boxes. The cook had boxed up a lot of dishes and stuff. We also had a lot of groceries that were put down there. Everybody had a blanket. There were two tents. All kinds of cooking utensils, pots and pans, and stuff like that; that was strung along the whole port side. The port side was strung along from forward to aft.

Q. And some blankets?

A. Some blankets were on top of the hatch, and some were between the rail and the engine-house.

Q. Was there any place to sit on the top of the house?

A. Not unless somebody climbed up on top of the load, on the mattresses, and all that.

Q. A nice, soft seat up there, wasn't it?

A. I don't know, I never was up there.

Q. From your experience as a sailor, is it your opinion that the open deck of a launch of the size of the "Three Sisters," with a tow-line of the type that was being used then, had as a safe place upon it a position as near as you were to that hawser?

A. I don't know anything about the safety of it. I picked it out because it was the only available place for me to be at that time.

Q. Then your testimony is that the only place for you to be while you were playing cards there was at the place you occupied, seated flat on the deck: Is that true? A. That is true. [258]

Q. And there was no place for you forward?

A. I don't know; I was never told to go any place on the boat. I went right back there and I stayed

(Testimony of William Carlsen.)

there. I was never told whether there was a forecastle there, or whether there was any other place for a man to go, I was never told by anybody.

Q. You had to duck your head once in a while, didn't you, while that hawser was swinging from one side to the other on the after deck?

A. No, sir, I never was that close to it.

Q. At what level, compared with your head, was the tow-line riding from the mast over the rail?

A. What do you mean, standing up or sitting down? When I was sitting back there, do you mean?

Q. Were you standing up a while around there?

A. I was standing up and walking around where I showed you this morning, and at that time I should judge the tow-line would be about level with somewhere around up here. (Indicating.) The tow-line was approximately about a foot above that hatch down there, as near as I can say. I did not measure it, but that is as near as I can tell.

Q. The "Three Sisters" was pitching a bit, was she not, on the way down?

A. Yes, she was pitching a bit.

Q. There was a swell, wasn't there?

A. Yes, there was a swell coming down.

Q. There was a heavy swell, wasn't there?

A. I don't know what you call a heavy swell out there.

Q. What do you call a heavy swell, as a sailor man?

(Testimony of William Carlsen.)

A. I have seen some awfully heavy swells. We had a pretty good swell for a small boat, I should judge.

Q. And that pretty good swell for a small boat meant that that boat was not only pitching, but that she was yawing, wasn't she? A. Yawing?

Q. You know what yawing is, don't you? Didn't you ever hear [259] the word "yawing"?

A. No, I don't think I have.

Q. Wasn't she also changing, as a vessel does, and moving sidewise, as well as up and down?

A. I don't know. I didn't take any notice of that. Of course a boat naturally does swing from one side to the other.

Q. Well, she was swinging from one side to the other, wasn't she?

A. A little bit, they do; you don't steer it exactly straight.

Q. Was the barge sheering from side to side?

A. I didn't take any notice of that.

Q. You didn't take any notice of that? A. No.

Q. You didn't notice the barge, at all?

A. Not after he got outside with it, no. I left all that to the captain.

Q. I am speaking of the time outside after you had lengthened the tow-line. Was not the barge swinging from side to side, sheering?

A. I didn't take any notice of that, no.

Q. You didn't notice that at all? A. No.

Q. Do you mean to testify that you did not have to move your head at any time while you were

(Testimony of William Carlsen.)

sitting there playing cards, to avoid having the hawser touch you?

A. Yes—not that I remember of did I ever move my head for the tow-line.

Q. How close was the tow-line to you when you were sitting down?

A. It was a matter of two or three feet from me, I suppose.

Q. You say two or three feet?

A. Well, between two and three feet, I should judge, from where we were.

Q. Then do you remember something about the situation after you had commenced to play cards, do you?

A. No, I don't. The only reason I said that was seeing the size of the boat this morning from where we were to the center of where the tow-line was made fast, and I judge that the distance from there to where we would be would be approximately two feet six, or such a matter as that. [260]

Q. In the balance of your testimony, in which you have answered my questions, Mr. Carlsen, are you answering them from what you saw down at the boat this morning, or from what actually occurring at the time.

A. I have answered everything as actually occurred at the time.

Q. And now you tell me that that hawser, while you were sitting there was, you say, two feet away from you?

(Testimony of William Carlsen.)

A. I said between two and three feet, as near as I could guess, yes.

Q. Are you basing that upon what you saw this morning as to the width, there, or upon what actually occurred that day?

A. Partly. I did not exactly remember the width of the boat. In fact, I don't know exactly the width of the boat right now.

Q. Mr. Carlsen, do you remember now that while you were playing cards there you knew that the hawser was a certain distance from you?

A. I cannot tell you anything about that, because I don't remember playing cards at all.

Q. Then you don't remember how far the hawser was from you either, do you?

A. I remember we were sitting back there against the rail, four or five of us at the time, and I don't remember whether we started to play cards there, or what we did. I should judge that when I first went back there I was sitting with my feet forward.

Q. Let me here ask you this: You do remember of the situation after the tow-line was lengthened; you were sitting, as you now say, with your back to the stern and your feet forward, looking forward: Is that correct?

A. That is the way I sat myself down in the first place, yes.

Q. And after you had seated yourself in that way, how long did you remain in that position?

A. I don't remember that, I cannot exactly say.

(Testimony of William Carlsen.)

Q. And you don't know how long after that it was until the [261] accident occurred? A. No, sir.

Q. And you don't know whether you played cards, or not? A. No, sir.

Q. And you don't know, if you did play cards, what kind of a game you played? A. No, sir.

Q. Do you remember whether you were playing for money, or not? A. No, sir.

Q. Do you remember the names of the men who were playing with you?

A. Only on what I have heard afterwards.

Q. Was Scotty Evans one of the men who played with you?

A. I don't think so, because I don't think he can play cards, I don't think he ever plays cards. I know that from previous experience with him.

Q. That is why you say he didn't play cards with you, then? A. I don't think he did.

Q. It was not because he was in the pilot-house, was it?

A. He couldn't have played cards and be in the pilot-house at the same time.

Q. In time, I would like to have you approximate for me how long after the tow-line was lengthened it was when you noticed the coil of the tow-line that you testified to this morning just aft the mast.

A. How is that? How long after it was lengthened out that I noticed that?

Q. Yes.

A. Immediately after they made the bight fast.

Q. Had you sat down at that time?

(Testimony of William Carlsen.)

A. I don't remember whether I sat down, or whether I was standing up at that time.

Q. How many coils were there in it?

A. I testified to that this morning.

Q. How many coils were there in it?

A. From 20 to 25.

Q. In your opinion as a sailor, and with your experience as a man who has been superintendent on a pile-driver, was the cable [262] used in that bridle of sufficient strength to make that tow?

Mr. HEIDELBERG.—That is objected to as immaterial, irrelevant and incompetent. He has never had any towing experience. It is calling for the conclusion of the witness. He has not been qualified.

The COURT.—I will overrule the objection.

A. I could not say because I didn't take notice of the bridle and really didn't know what size bridle it was. At that time I paid no attention to the condition of it, or what it was.

Q. Do you think that a ¾-inch malleable iron cable would be sufficient? A. No, sir, I don't.

Q. Do you think ⅞ would.

A. I hardly think the ⅞ would.

Q. What size do you think would be necessary?

A. I should think at least an inch cable, or an inch and a quarter for an outside tow.

Q. And your answer would be the same for a steel cable?

A. Yes, sir. That is my honest opinion about it. I am not a practical towboat man, but that is my opinion about that.

(Testimony of William Carlsen.)

Mr. LILLICK.—Q. For an outside tow?

A. For any outside tow, or if there is any swell, I should judge so, yes.

Q. What difference would the weight of the barge or towboat make with reference to the size of the bridle that you have been asked about as ¾ of an inch and a size of 1 inch can you tell me?

A. No, I cannot, because I am not a practical towboat man.

Q. Then upon what did you base your opinion a moment ago that ¾-inch cable was not sufficient, and an inch would have been?

A. I think a ¾ cable is too small a cable, from what I have seen around the bay, here.

Q. Then, you have had some experience around the bay, have you?

A. I have been on pile-drivers on barges that have been towed inside the harbor. [263]

Q. What size do they use there?

A. They use ¾ to ⅞ inside, here.

Q. Do they use anything larger than a ⅞?

A. I don't think a launch does, but sometimes if you get a Red Stack towing going up the river they will have something bigger.

Q. On what tow-line do you know of any Red Stack ever to use a bridle in towing up the river?

A. I never saw any.

Q. Then what did you have in mind a moment ago when you spoke of a Red Stack tug towing up the river?

(Testimony of William Carlsen.)

A. They use the tow-line they have on them already.

Q. A manila hawser?

A. No, not lately; lately they use wire, and then also they have a spring engine on it.

Q. You mean a towing machine?

A. Yes, something like that.

Q. Do you know anything about the weight of the barge and the pile-driver on it that the "Three Sisters" towed down that day?

A. The barge, I presume, would weigh around from 400 to 450 tons.

Q. That is, you mean coming down? A. Yes.

Q. And the "Three Sisters" weighed, with all of your equipment on her, how much?

A. I have no idea about the "Three Sisters."

Q. As a sailor, I will tell you her gross tonnage was 28.

A. I don't know the dimensions of her or the weight of her.

Q. I just told you that her tonnage was 28; that means nothing to you as to displacement of the vessel? That means nothing to you, does it?

A. Well, I don't know that it does. I never considered the size of the boat or the weight of it at all at any time.

Q. You have just said that the barge and the pile-driver weighed together from 400 to 450 tons.

A. Yes.

Q. Now, in the same manner, will you tell me what you think the "Three Sisters" weighed?

(Testimony of William Carlsen.)

A. You mean the boat, and the whole [264] thing?

Q. Exactly.

A. Well, I should judge maybe 80 or 90 tons.

Q. And you say that in your opinion the bridle was not of sufficient strength to make that tow?

A. I don't think so, no.

Q. You don't think so? A. No.

Q. Did you think so then?

A. I didn't know what size it was, then.

Q. You saw it taken off the "Three Sisters," didn't you?

A. I just seen it enough to know that it was a wire, and that is all. I didn't pay no attention to the size of it, or nothing. It was not my business to interfere with it.

Q. Then why did you notice the distance between the launch and the barge if, before your eyes, on the after part of the "Three Sisters," the bridle, itself, was taken up and attached by your men?

Mr. HEIDELBERG.—I object to that question, your Honor, as argumentative.

The COURT.—Objection overruled.

A. I could not help but taking notice of the distance, because I was standing watching them slackening it back and making the line fast.

Mr. LILLICK.—Q. So you watched them slackening it back? A. Yes.

Q. Then you do remember something more than you testified to this morning, don't you? How many feet between the hawser, as it left the rail

(Testimony of William Carlsen.)

of the "Three Sisters" at the stern was it before it touched the water, while you were looking at it?

Mr. HEIDELBERG.—At what time do you mean?

Mr. LILLICK.—Just when he testified to now, that he was looking at them slackening it out.

Mr. HEIDELBERG.—He has given no testimony that he saw it [265] touch the water.

A. I didn't see it touch the water at all.

Mr. LILLICK.—Q. So it is your testimony that the hawser from the rail of the "Three Sisters" to the bridle on the barge did not touch the water?

A. Not that I know of. It touched the water when they slacked it off; of course, when you slack a line off it runs right out.

Q. When they slacked it off, where did it go into the water?

A. I didn't pay no attention to that, particularly.

Q. You don't know whether it was ten feet or 30 feet from the after part of the boat?

A. I do not, no, sir.

Q. Do I understand you, Mr. Carlsen, to say, as you did a moment ago, to testify, when the tow was under way, after the line had been made taut, that the hawser did not touch the water during the tow?

A. I testified that I did not notice whether it did, or not, at any time.

Q. Then you don't know whether it did, or not?

A. No, sir.

(Testimony of William Carlsen.)

Q. And you don't know whether the hawser was in the water, at all?

A. I don't know anything about that, at all.

Q. You cannot tell me whether on the receding swells and as the tow was being made, the hawser went out of the water or went into the water coming down? A. I could not tell you, no, sir.

Q. You didn't notice that? A. No, sir.

Q. Did you notice any jerking at all on the "Three Sisters" as the tow was being made, after the line had been lengthened? A. No, sir.

Q. So that it was perfectly smooth and a steady pull?

A. No, sir, it was not perfectly smooth. There was quite a good ground swell out there. The boat was going like that, as any boat will. I did not notice any particular jerk at any time, though.

Q. You said the captain came out of the engine-room, and that [266] he had speeded up the boat; was that your testimony?

A. I said that he came out of the engine-house and he said, "How do you like the speed of her now?" Whether he had slowed her up or whether he had speeded her up, that I don't know. I don't know what he done to her at all.

Q. You don't know whether she was running at half speed or full speed then?

A. No, sir, I don't.

Q. Did someone else tell you that Scotty had steered the boat for a while? A. No.

Q. Or did you see him yourself?

(Testimony of William Carlsen.)

A. I seen him myself. I seen him in the pilot-house, myself.

Q. Where were you when you saw him in the pilot-house?

A. I was back on the starboard side, back of the engine-house some place.

Q. And do you mean to tell us that you could tell that he was steering, or had his hand on that wheel? A. Absolutely.

Q. You were flat on the deck, were you?

A. How is that?

Q. You were standing on the deck, were you?

A. Yes, sir.

Q. Do you remember that the galley is between the after part of the pilot-house and the wheel-house? A. Yes, sir.

Q. And you think that wheel is in a position where you could see from the deck by the engine-house? A. Yes, sir.

Q. This morning, Mr. Carlsen, on direct examination you testified that Scotty Evans was steering the boat while you were cleaning fish; was it then that you noticed him steering the boat?

A. I never testified to you that I did clean fish.

Q. Then we will put it this way: When you testified this morning, you testified that at the time Kruger came back and showed you how to clean fish that Scotty Evans was at the wheel; is that true?

A. Kruger never came back there and showed

(Testimony of William Carlsen.)

me [267] how to clean fish, Kruger came back there and cleaned the fish.

Q. Put it this way: This morning you testified that at the time Kruger came back—to clean the fish, do you say? A. Yes.

Q. —that Scotty Evans was at the wheel: Is that true?

A. Yes, I think he was at the wheel at that time. I say he was steering the boat at that time.

Q. Did you see him then?

A. I seen him at the wheel, there, yes, but I don't know just exactly to the minute that he was there, or how long he was there. I cannot testify to that, but I know that he had the wheel.

Q. One more question on the distance between the barge on the "Three Sisters." After the accident you were unconscious, were you not?

A. Yes, sir.

Q. For what length of time did you remain unconscious?

A. I cannot tell you; that is, I do not know as to the time that expired. I don't remember much of anything until Saturday; that is, it seems like a dream to me. I cannot tell you what transpired in the meantime. I don't remember anything. I remember being transferred from the Central Emergency Hospital to the St. Francis Hospital on Saturday, in the daytime, I know it was daytime. That is the first I can say that I remember.

Q. Will you take time to consider this, please; tell me how long it was after the accident when

(Testimony of William Carlsen.)

you first thought of the length of the hawser between the "Three Sisters" and the barge.

A. It might have been a week or so, when I began to come to myself, that I was thinking of it, that I began to think about the accident and how it really happened to me.

Q. And then you started to figure out how long the tow-line was?

A. I knew how long the tow-line was; that is, I had that in my mind right then in regard to the length of the tow-line. [268]

Q. How long was the tow-line on the trip up, when you started out from here first, do you remember that?

A. No, sir, I don't know anything about it when they started from here, I was not on the boat then, but when we passed the "Three Sisters" with the "Corona" I should judge then he had a line out, as near as I could guess from where I was, of around 450 feet.

Q. That was on the up trip?

A. On the up trip, yes.

Q. How many spars were there on the barge on that up trip? A. I could not truthfully tell you.

Q. About how many were there?

A. I couldn't say unless I made a guess at it. You can get that from Healy-Tibbitts. They loaded it, I didn't load it.

Q. You would have to guess at that?

A. I didn't count them.

(Testimony of William Carlsen.)

Q. You drove those very piles at the pier, though, didn't you?

A. Yes, I drove those very piles, and more, too.

Q. And they were taken up for the purpose of building that very pier?

A. Yes. I don't even remember now how many were driven over there; I couldn't tell you truthfully.

Q. Have you no recollection as to how many you took up on the barge?

A. No, sir. I didn't know how many were loaded on the barge. I know that we put an addition to the dock, and also we put in extra piles for brace piles and mast over there. All told how many piles are in there I couldn't tell you, I do not now remember.

Q. How much of the space on the barge was taken up by the pile-driver?

A. There were several tiers of piles.

Q. You do remember something about it, then, don't you.

A. I remember something about it, but I would not say how many there were.

Q. Would you say there were 50 piles?

A. Yes, sir, I would say 50. [269]

Q. Between 50 and 100?

A. Somewhere in there.

Q. Were they creosoted?

A. Some were creosoted and some were green.

Q. The barge was very much heavier on the up trip than on the down trip, wasn't it?

(Testimony of William Carlsen.)

A. Yes, she was heavier loaded on the up trip than coming down.

Redirect Examination.

Mr. HEIDELBERG.—Q. When did you first consult Mr. Joseph McShane as your attorney in this case?

A. It was around five or six weeks after the accident.

Q. And he was the first attorney you consulted?

A. Absolutely.

The COURT.—Q. When was anything said to Mr. Paladini about a claim being made?

Mr. HEIDELBERG.—Your Honor, Mr. McShane will show when he made the claim; that is just exactly what I was laying a foundation for.

The COURT.—All right.

TESTIMONY OF PHILIP EVANS, FOR CLAIMANTS.

PHILIP EVANS, called for the answering claimants, sworn.

Mr. HEIDELBERG.—Q. What is your business, Mr. Evans? A. Pile driver.

Q. How long have you been a pile driver?

A. Since the fire, 1906.

Q. In the month of May and the first part of June, 1923, where were you working?

A. Over at Point Reyes—Drake's Bay.

Q. Calling your attention to June 8, 1923, as the day that you left there, I will ask you what boat did you leave there on upon that day?

(Testimony of Philip Evans.)

A. The "Three Sisters."

Q. How long was it before you left there for the last time that you had seen the "Three Sisters"; how long had she been in Drake's Bay before you left? How long had the "Three Sisters" [270] been in Drake's Bay before she finally left on that last trip on which you came down?

A. I couldn't tell you that.

Q. Don't you know whether it was one day or three days?

A. You mean how long she stayed there before we left?

Q. Yes.

A. Well, I guess it must have been about a day or two.

Q. Do you remember when she arrived there for her last trip down?

The COURT.—There is no dispute about that, is there?

Mr. HEIDELBERG.—No, your Honor, but I was just leading up to that conversation.

Q. When the "Three Sisters" arrived at Drake's Bay for the last time, did you hear any conversation between the captain and Mr. Carlsen?

A. Not that I know of.

Q. You don't know of it? Did you come back and forth from Point Reyes during the time you were up there from May 10 to June 8, 1923?

A. I did, yes.

Q. You didn't stay up there all the time, though, did you?

(Testimony of Philip Evans.)

A. No, I went home every Saturday.

Q. And when you would come home what boats would you come on?

A. I came down on the "Three Sisters," and I came down on the "Corona."

Q. How would you go back up to Point Reyes?

A. Went back with the steamer again.

Q. With what steamer?

A. With the "Three Sisters." I went back a couple of times on her, and the same way on the "Corona," back and forth.

Q. When you got on the "Three Sisters" to go back this last time, did you ask the captain's permission to go upon her? A. No.

Q. When you got on the "Three Sisters," where did you go, on what part of the boat were you?

A. I was on the forepart of it, that is, when I got aboard and got everything all secured. [271] That was on the way home, you mean?

Q. Yes. A. Yes, sure.

Q. Were you on the barge some of the time while the barge was being towed from Drake's Bay to San Francisco? Were you on the barge at any time?

A. No, I never was on the barge from the time I left her until I went down on the steamer.

Q. You were not on the barge at the very first, helping to pull the anchor, there?

A. Sure, I was on her then, yes.

Q. And then later on, after that, you got off the barge and on to the "Three Sisters," did you?

(Testimony of Philip Evans.)

A. Yes, after we got everything secure and ready for towing out.

Q. Did you ever go into the wheel-house at any time during this trip down? A. I did.

Q. What did you do in there?

A. I took the wheel for a few minutes.

Q. And you steered the boat? A. I did.

Q. Where was the captain at that time, if you know? A. He was out on deck somewheres.

Q. Where was the deck-hand?

A. He was doing something else, I don't know what he was doing, but he is the one that relieved me.

Q. He relieved you finally? A. He did.

Q. Did you notice the barge as it was being towed on the outside after you had passed the bell buoy, did you notice the barge after that time?

A. After we passed the bell buoy?

Q. Yes.

A. No, I didn't, I never paid no attention to her.

Q. You didn't pay any attention to the barge after that time? A. No, sir.

Q. Did the captain or anybody else ever tell you upon what particular part of the boat you were to stay? A. He never said [272] a word.

Q. Did the captain ever warn you about not going to any particular location on this boat?

A. No.

Q. You were on board the boat when Mr. Carlsen and Mr. Sauder were injured? A. Sure.

(Testimony of Philip Evans.)

Q. What did you do then?

A. I was in the kitchen at the time the accident happened.

Q. Then what did you do after the accident?

A. I came out on deck.

Q. Did you help Mr. Carlsen in any way?

A. I went right back there and hauled the tow-line in, the hawser, and then I went and attended to them.

Q. Where was Mr. Carlsen when you hauled the hawser in? A. He was lying down.

Q. Where was he lying down?

A. He was lying down in the after part of the house.

Q. Was he on any rope, or anything like that?

A. Yes, I think he was lying on the rope, there.

Q. Was it on the same rope that you were pulling in?

A. The same rope, yes. The other end of the rope was aft; it was lying there on deck all coiled up. This was thrown down and that was all.

Q. Was Mr. Carlson placed on this wet rope as you pulled it in?

A. No; it was the other part of the hawser that was lying on deck, and he was laid right on top of the hawser.

Q. When you pulled the hawser in, was any part of the bridle and swivel attached to it?

A. Yes, the swivel and the bridle were on to it.

Q. What did you do with them?

(Testimony of Philip Evans.)

A. I laid them on the deck, and I never touched them from that day to this.

Q. You saw Mr. Sauder injured, too, didn't you? [273]

A. Yes, sure I did; I was right there with both of them all the time until we got into port.

The COURT.—Q. How much line did you have out, how much hawser was there out?

A. Somewhere close on to 200, as near as I can judge; there maybe a little more or a little less, I don't know.

Mr. HEIDELBERG.—I think that is all.

Cross-examination.

Mr. LILLICK.—Q. You didn't pay very much attention to the hawser's length, did you?

A. No.

Q. There was not any more reason for you to watch that than there was the steering of the boat, was there? A. No.

Q. You boys just got on the "Three Sisters" up there and piled aboard her to ride down home: Wasn't that it? A. Yes.

Q. When the chap was at the wheel, you, as an old sailor man, were there talking to him, weren't you?

A. I spoke to him several times there at the wheel.

Q. And while you were there, as sailors will do, he probably asked you to take the wheel for a minute? A. He didn't.

Q. Didn't he? A. No.

(Testimony of Philip Evans.)

Q. How did it happen, then?

A. I took it myself, I relieved the deck-hand.

Q. You mean Anderson? A. Yes.

Q. Anderson wanted to go below for a minute, did he?

A. Well, he had something to attend to, I guess; I was not there very long before he came back and relieved me again.

Q. Can you remember about when that was with reference to when you lengthened out the line, whether it was before or after that that you took the wheel?

A. It was lengthened out before I took the wheel.

Q. Long before you took the wheel?

A. Oh, yes. [274]

Q. How long would you say you stayed at the wheel?

A. I don't think I was there ten minutes.

Q. And was that before the rope broke?

A. A long time before that.

Q. So it had nothing to do with the breaking of the bridle, did it?

A. Oh, no, that was a long time before that.

Q. Did you help the other boys get the stuff on deck? A. Yes, sir.

Q. When that was put on deck, do you remember where the stove was put?

A. Yes, it was on the forepart of the pilot-house.

Q. On the forepart of the pilot-house.

A. Yes, sir.

(Testimony of Philip Evans.)

Q. How did the boys get that down?

A. They just helped one another to get it down off the deck.

Q. They didn't take it down with a boom and tackle, did they? Don't you remember that they used the boom and tackle with it because it was heavy?

A. Well, when they got that stove down aboard I was packing down the other stuff on the dock. I guess they did.

Q. It was pretty heavy, wasn't it? A. Yes.

Q. You remember the tackle they had to take the barrels off, don't you? A. Yes.

Q. And don't you remember they put that tackle, one on each side of the stove, and that they just swung it right over on to the launch?

A. I don't know; I was not there at the time.

Q. You were not there when they did that?

A. No. I was busy doing something else, I guess.

Q. Do you remember the small ropes the "Three Sisters" had on, what they were—her spring line, and her stern line?

A. No, I didn't pay much attention to her lines.

Q. She had some lines aboard while she was moored there, didn't she?

A. She had her lines to make herself fast.

Q. You don't remember where those lines were piled, do you? A. No. [275]

Q. In order to remind you of it, do you remember that when she went away from the dock they just threw those ropes on the deck?

(Testimony of Philip Evans.)

A. I don't know what they done with them.

Q. They were on the deck somewhere, weren't they?

A. Oh, they were on the deck somewheres, I suppose, but where they were I do not know.

Q. Have you any recollection of the size of those lines?

A. They were smaller lines than the hawser was.

Q. About three-inch lines?

A. What I would call three-inch lines, yes, as a rule.

Q. Do you remember the boys playing cards on the back of the launch?

A. I didn't pay any attention to that at all, I was not around there at all at the time they were playing.

Q. You don't know who was forward and who was aft? A. No.

Q. Do you remember the little place in the galley where the mirror is, at the left of the stove?

A. Yes, I think that I do.

Q. Do you remember where that man was shaving that morning?

A. Yes, I was talking to him in there.

Q. You couldn't see that man, where he was shaving, from the after portion of the "Three Sisters," could you?

Mr. HEIDELBERG.—That calls for the opinion and conclusion of the witness, your Honor.

Mr. LILLICK.—No, it doesn't, it calls for what he could see.

(Testimony of Philip Evans.)

The COURT.—I will overrule the objection.

A. What is that again?

Mr. LILLICK.—Q. Where that man was shaving at that mirror, on the port side, you cannot see from the starboard quarter of the deck aft who is at that mirror, can you?

Mr. HEIDELBERG.—If your Honor please, I may not be a seafaring lawyer, and I don't know what they mean by "aft," just [276] how far, or whether it has any particular crossing line, or not, but it would certainly depend a great deal upon what the word "aft" means, and where the person was located. Without placing him definitely and specifically at some certain place, I do not see how this man can answer the question.

The COURT.—I think that is true, Mr. Lillick.

Mr. LILLICK.—There may be something in that, your Honor, but, judging, or rather, considering where that mirror was, I do not think a man at the mirror could be seen from any part of the after deck.

The COURT.—Q. Do you know where Mr. Carlsen and the other men were playing cards on the after deck? A. What is that?

Q. Do you know that Mr. Carlsen and three others were playing cards on the after deck?

A. Yes, sir.

Q. You saw them there?

A. No, I didn't pay any attention to them at all.

Q. Do you know where they were playing cards?

(Testimony of Philip Evans.)

A. They must have been playing cards aft somewhere.

The COURT.—Evidently he does not know.

Mr. LILLICK.—No, he does not know.

Q. You were in the forward part of the launch at the time of the accident?

A. I was in the kitchen, between the pilot-house and the engine.

Q. Were you there when they lengthened out the tow-line? A. No.

Q. Where were you then?

A. I was on the barge when they lengthened it out.

Q. You were on the barge when they lengthened it out? A. Yes.

Q. And then the "Three Sisters" came back alongside the barge? A. Yes, and picked us up.

Q. Where did you hop aboard the "Three Sisters"? A. She backed right up to us. [277]

Q. And where did you go when you got on board the "Three Sisters"?

A. I walked right along forward.

Q. And you went in the galley?

A. We had something to eat.

Q. Where did you have that?

A. In the forward part, alongside the house.

Q. Alongside the house, in the forward part of the vessel?

A. Yes, between the pilot-house and the after part of the house.

Q. Along that alleyway?

(Testimony of Philip Evans.)

A. Yes. There was no other place where we had room to eat; some of us were in the galley.

Q. After you had what you wanted to eat, did you go in the galley?

A. I laid around the deck a little while and had a smoke.

Q. And then where did you go?

A. I went in the alleyway there.

Q. Why didn't you go back alongside of that line the way the other boys did?

Mr. HEIDELBERG.—That is objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. LILLICK.—Q. (Continuing.) You thought it was a little dangerous back there, didn't you, alongside of that hawser?

Mr HEIDELBERG.—That is objected to as immaterial, irrelevant and incompetent, as to what this man thought about it. It is immaterial what he thought about it; it is only material as to what Carlsen and Sauder thought about it.

The COURT.—No, not at all. This man is an old sailor. He has a right to give his opinion. Objection overruled.

Mr. LILLICK.—Q. (Continuing.) You didn't want to go back there alongside that hawser, did you, when there was a place in the alley? A. No.

Q. Is it not true that wherever there is a hawser like that on a towboat you keep away from the hawser? A. Yes.

Q. And it is generally known among the seafar-

(Testimony of Philip Evans.)

ing men that if that [278] hawser snaps somebody is going to get in trouble; that is true, isn't it? A Yes, sir.

A. And the reason you didn't go back there was because you were in a safe place up there in that little alley where you would not get hurt?

A. Yes, it was about as safe a place as any.

Q. It was a great deal safer than back there where the hawser was, wasn't it? A. Sure.

Q. And that is why you were there; that is true, isn't it?

A. Well, there was not much room about the boat, and I suppose everybody could suit themselves.

Q. And you suited yourself by going in a safe place; that is true, isn't it?

A. Yes, that was a safe place to be.

Redirect Examination.

Mr. HEIDELBERG.—Q. Mr. Evans, had you ever seen anybody injured during your lifetime with a tow-line like this? A. Yes, I have.

Q. When did you see that happen?

A. A good many years ago.

Q. What happened at that time, how was the injury sustained? A. The hawser carried away.

Q. How did it carry away.

A. The bitt gave way.

Q. Where was the bitt?

A. On the forecastle-head.

Q. You never saw a hawser whip back over the stern of a vessel like this one, did you? A. No.

Q. So when you say that you thought it was a

(Testimony of Philip Evans.)

safe place, do I understand you to say that you had really considered whether the back end was safe, or was dangerous—you didn't consider that at all, did you, Evans?

Mr. LILLICK.—Objected to as leading and suggestive, and particularly leading just after the court has taken a short recess.

The COURT.—It is a pretty leading question. [279]

Mr. HEIDELBERG.—Q. Do I understand you to say that when you got on this boat you even considered what part of the boat was safe and what part of the boat was dangerous?

A. Any part of the boat, so far as that was concerned—it was every man for himself, to look out for himself.

Q. Again I ask you, when you got on board the "Three Sisters," did you think in your own mind as to what part of the boat was dangerous and what part of the boat was safe?

Mr. LILLICK.—Objected to as immaterial, irrelevant and incompetent, and not within any of the issues of the case.

The COURT.—Objection overruled.

Mr. LILLICK.—I think I will withdraw the objection. I will strike it out entirely if the Court will permit me.

Mr. HEIDELBERG.—Q. Can't you answer that question? Don't you know what it is?

A. The safest part of the boat?

(Testimony of Philip Evans.)

Q. Did you consider whether any part of that boat was dangerous or not?

A. No, I didn't consider anything like that, not at the time.

Q. Of course, you knew afterwards, when the tow-line broke and snapped back, you know now that that part of the boat was dangerous?

A. Yes.

Q. But you did not stop and consider that when you got on the boat, did you? Well, you don't seem to understand. That is all.

Recross-examination.

Mr. LILLICK.—Q. Mr. Evans, you knew it was a dangerous place before, didn't you?

A. Well, that is the rule.

Q. That is the dangerous part of the boat when they are towing, isn't it? A. As a rule, yes. [280]

TESTIMONY OF WALTER H. CARLTON, FOR PETITIONER,

WALTER H. CARLTON, called for the petitioner, sworn.

Mr. LILLICK.—Q. In May of 1923, Mr. Carlton, what connection had you, if any, with A. Paladini, Inc.? A. What connection did I have?

Q. Yes, what position did you have with them?

A. Port engineer.

Q. What, if anything, did you have to do in ob-

(Testimony of Walter H. Carlton.)

taining the hawser that was used by the "Three Sisters" in towing the barge up to Point Reyes about May 8th or 10th? A. Nothing.

Q. From whom was the hawser obtained, do you know?

A. From the Associated Trawling Company.

Q. Who got the hawser from them? A. I did.

Q. When?

A. Just after the trawling company broke up.

Q. Where had the hawser been in the meantime?

A. It was between pier 23 and pier 21, on the bulkhead, upstairs; I put it up there after we moved.

Q. When did you see the hawser last before the towing of the barge and pile-driver up to Point Reyes?

A. I used it to tow the "Iolanda" over to Crowley's shop with the "Three Sisters."

Q. Do you know whether the hawser was of the same length when the tow up to Point Reyes was made by the "Three Sisters"?

A. It was never cut, so far as I remember.

Q. How long was it when the tow up to Point Reyes was made?

A. When I took it off the wharf, there, it was, on an average of between 90 and 100 fathoms.

Q. And how long was that before the tow up to Point Reyes was made?

A. I cannot give any date.

Q. Would you say it was the week before, or the day before? A. No, it was a long time before.

(Testimony of Walter H. Carlton.)

Q. Did you see it at any time while the tow was being made up to go to Point Reyes with the pile-driver?

A. I saw it on [281] the wharf, yes, sir.

The COURT.—Q. Did you buy that hawser?

A. No. We had it at the trawling company when I was port engineer there.

Q. Did Paladini buy it from them?

A. Yes, sir.

Q. Are they sold by the fathom, or by the pound?

A. By the pound.

Mr. LILLICK.—Q. When you saw it, when it was on the barge, how long was it?

A. About the same length.

Q. Did you see the bridle that was used by the "Three Sisters" to tow the barge up to Point Reyes?

A. The only time I saw the bridle was on the barge at Pier 23, the next morning. I never went on board, and I had nothing to do with it.

Q. By "the next morning," what do you mean?

A. The morning of the tow.

Q. You mean the tow up? A. Yes.

Q. Did you make any examination of it at that time?

A. I just went and looked at it, and I saw that it looked all right. It was about a 7/8 cable, I think it was, and it was galvanized.

Q. How about the thimble and the swivel, what material was that?

A. It was a regular forging, galvanized.

(Testimony of Walter H. Carlton.)

Q. Do you know whether or not the swivel was turning on the pin, or whether it was frozen by rust, or otherwise?

A. No, it was not frozen, it was turning.

Mr. HEIDELBERG.—I think that is slightly leading, Mr. Lillick.

Mr. LILLICK.—I think not when I put it both ways. However, the question has been answered.

The COURT.—I think that is all right; I think that question is all right.

Mr. LILLICK.—Q. Mr. Carlton, while you were port engineer, and when your instructions were given to the captains of the "Three Sisters" and the "Corona," what, if anything, were your [282] orders with reference to taking up and bringing back the men who were working on this job?

Mr. HEIDELBERG.—That is objected to as being leading and suggestive.

The COURT.—No, I don't think it is leading; he is simply asking him what his orders were. There is no suggestion as to what the answer should be.

A. I didn't have no orders at all regarding that.

Cross-examination.

Mr. HEIDELBERG.—Q. When was the last time you say you saw this tow-line, Mr. Carlton?

A. I think it was about a day before the barge was towed up on the wharf, there.

Q. Where did you see it at that time?

A. Pier 23.

Q. How long before that time had you seen it?

(Testimony of Walter H. Carlton.)

A. Oh, I have seen it right along there, because I was on the wharf every day.

Q. You were on the wharf every day?

A. Yes, sir.

Q. You were on the wharf every day up to the time you left the employ of A. Paladini as port engineer? A. Yes, sir.

Q. You saw these boats come in and go out, didn't you? A. Yes.

Q. Did you ever see the "Three Sisters" come in from Point Reyes? A. With the fish, yes.

Q. Did you ever see the "Corona" come in?

A. Yes.

Q. Did you see the "Corona" come in from Point Reyes with these men on board?

A. I was not on the wharf during the time the wharf was being built.

Q. I mean in San Franciso.

A. I mean I was not on the wharf in San Francisco during the time the wharf was being built.

Q. You mean now the wharf at Point Reyes.

A. Yes, because I had left the employ of Paladini then.

Q. When did you leave the employ of Paladini?

A. I really don't know what date it was, I would have to look it up. [283]

Q. Do you know who it was that succeeded you in your position as port engineer? A. Mr. Davis.

Q. Do you know whether he immediately succeeded you, or not, or whether there was a lapse of time afterwards? A. Immediately.

(Testimony of Walter H. Carlton.)

Q. Don't you remember when that was?

A. No.

Q. You mean to say, then, you were not on the wharves in San Francisco, or not in the employ of A. Paladini at any time during the building of this wharf.

A. I may have been down on the wharf, because I was working for the Enterprise Diesel Engine Co. then and I had occasion to go on the boat.

Q. Can't you remember when you entered the employ of the Enterprise Deisel Engine Co.?

A. I think it was some time in May.

Q. As a matter of fact, weren't you in the employ of Paladini on May 15, 1923?

A. I would not say for sure.

Q. Don't you know as a matter of fact that you did not leave Paladini's employ until right close to the last day of May?

A. I would not say any date; it may have been then, but I don't know what date it was.

Q. Do you mean to say that the lines on the bridle were galvanized? A. Yes, sir.

Q. Are these galvanized, referring to Claimant's Exhibit "A"?

A. Yes, those are galvanized.

Q. And yet those are rusted, aren't they?

A. A little bit, not much.

Q. What was the condition of the tow-lines on the bridle of this one used to tow that barge up there? A. You mean the tow-line?

(Testimony of Walter H. Carlton.)

Q. The bridle. A. It was not rusted.

Q. It was not rusted at all?

A. It was galvanized. There was a little black tar on it. [284]

Q. It was not rusted at all? A. No, sir.

Q. Did you examine the swivel that day carefully? A. I just looked at it.

Q. How far away from it were you when you looked at it? A. About two feet.

Q. How can you say it was turning freely and not frozen fast?

A. You can tell by looking at it lying on the ground.

Q. Could you tell from this one whether it worked freely or not?

A. I can if I get close enough to it.

Q. Come down and look at it. You turned it over, didn't you? A. That is what I did.

Q. You did do that? A. Yes.

Q. I thought you said you didn't touch it. I thought you said you looked at it from two feet away.

A. I may not have touched the swivel, but I touched the cable.

Q. But you touched the swivel, didn't you?

A. Yes.

Q. You wanted to see whether it was frozen fast, or not?

A. Because there is no cable on it.

Q. Would it make a difference if there was a cable on it? A. Yes, sir.

(Testimony of Walter H. Carlton.)

Q. It would? A. Yes, sir.

Q. And you would be able to tell that difference two feet away, would you? A. Yes, sir.

Q. How do you know it was a 7/8 wire on the bridle?

A. Well, I have a pretty good judgment of sizes when I look at anything.

Q. What is this size?

A. It is 3/4, I think, about 3/4.

Q. It is about 3/4?

A. No, not about 3/4, it is 3/4.

Q. How do you know that?

A. Because my mechanical ability tells me that.

Q. You can tell that it is exactly 3/4, can you?

A. Well, it [285] may be 11/16 or it may be 13/16. I can tell the difference between a half and 7/8.

Q. You can tell the difference between 5/8 and 7/8, can you?

A. When I am close to it. When I was over examining it I looked at it.

Q. Then you made up your mind it was 3/4?

A. It just happened to pass through my mind that it was 3/4.

Q. If I told you it was 5/8 you would say I was wrong, would you?

A. No, I would not say you were wrong; I would not say I was right in saying it was 3/4.

The COURT.—Well, is that 5/8?

Mr. HEIDELBERG.—I don't know your

(Testimony of Walter H. Carlton.)

Honor; that is for the witness to say. I am going to find out, however.

Mr. LILLICK.—Then I don't think that examination is hardly fair, your Honor.

The COURT.—Well, I don't think it is of much consequence, anyway.

Mr. LILLICK.—Q. Have you a rule in your pocket? A. No.

Mr. HEIDELBERG.—Q. There are two swivels, Mr. Carlton. A. Yes.

Q. They are of a distinctly different type?

A. Yes.

Q. What was the type of swivel used on the barge that day? A. I can't remember that.

Q. You can't remember the type?

A. There are two or three different kinds of swivels, I can't tell the exact kind.

Q. You see there is a noticeable difference between those two; which swivel was it?

A. I can't tell.

Q. You cannot tell? A. No.

Q. And yet you examined them to know that they worked freely?

A. Well, you might examine a swivel, but that is quite a long [286] while ago and I didn't pay any attention to it.

Q. What did you do about getting the bridle?

A. Nothing at all.

Q. You didn't have any orders from Paladini about getting that bridle, did you? A. No, sir.

(Testimony of Walter H. Carlton.)

Q. And you absolutely took no part whatsoever in getting that bridle? A. No, sir.

Q. Do you know Mr. Del Favero?

A. No, sir.

Q. You never talked to him in your life, did you? A. No, sir.

Q. You never talked to him specifically about getting this cable, did you? A. No, sir.

Q. And Mr. Paladini never gave you any instructions at that time relative to getting this bridle? A. No.

Q. Or about getting the swivel? A. No.

Q. And you were port engineer at that time, yet you don't know where it came from at all?

A. I do not.

Q. Of course, you don't know, Mr. Carlton, what happened to this tow-line after the time you left the employ of Paladini on June 5 or 6, 1923, do you? A. No, sir.

Q. You don't know anything about the "Three Sisters" having made a trip to Santa Cruz or to Monterey, during that time, do you? A. No, sir.

Q. It was not made under your orders or under your direction at all? A. No, sir.

Q. You don't know whether or not the tow-rope was cut during that time, or anything about it?

A. No.

Redirect Examination.

Mr. LILLICK.—Q. Will you take this pair of calipers and a ruler and tell us what the size of

(Testimony of Walter H. Carlton.)

this cable is, referring to the cable about which the witness was interrogated a few moments ago?

A. ¾.

Mr. HEIDELBERG.—Q. Mr. Carlton, you don't know, of course, [287] what happened to that cable or what happened to the swivel, and when I say "cable" I mean the cable on the bridle, after the accident, do you? A. No, sir.

Q. You were not in the employment of Paladini at that time? A. No.

Q. You never saw it?

A. No, I never saw it.

Q. And, Mr. Carlsen, you also do not know, of course, that the same swivel, or the same tow-line, or the same bridle was used to tow the "Three Sisters" back that was used to tow it up to Point Reyes? A. No, sir, I do not.

TESTIMONY OF GEORGE REID, FOR CLAIMANTS.

GEORGE REID, called for answering claimants, sworn.

Mr. HEIDELBERG.—Mr. Reid, what is your business? A. Pile-driver man.

Q. How long have you been engaged in that business? A. Since 1907.

Q. In the year 1923, you were engaged in that business? A. Yes, sir.

Q. By whom were you employed in May and June of that year? A. Healy & Tibbitts.

(Testimony of George Reid.)

Q. Working under whom? A. Mr. Carlsen.

Q. Whereabouts? A. Point Reyes.

Q. How did you get up to Point Reyes to work on that job? A. On the "Corona."

Q. Did you have anything to do with the loading of Barge 61?

A. Nothing any more than the rest of them did; Mr. Carlsen has already told you what happened.

Q. When you were up at Point Reyes, how long were you up there?

A. About four weeks, I guess.

Q. Did you remain up there all of that time, or did you come [288] back and forth?

A. Came back and forth over the week-ends.

Q. How would you get back and forth?

A. On Paladini's boats.

Q. When you say "Paladidi's boats," what do you mean, what ones do you mean?

A. On the "Corona" and on the "Three Sisters."

Q. Can you tell how many times you went up to any particular boat? A. No.

Q. What would you say as to the relative number of times you went on the "Corona" as compared to the number of times you went up on the "Three Sisters" and that you came back?

A. None at all.

Q. You would not want to say?

A. Not either way.

Q. Did you go up on the "Three Sisters" at any time? A. Yes, sir.

(Testimony of George Reid.)

Q. And did you come back on the "Three Sisters" at any time? A. Yes, sir.

Q. Did you come back on the "Corona" at any time? A. Yes, sir.

Q. You would not care to say the number of times you went up on each one of them, or any one of them? A. No, sir.

Q. When did the "Three Sisters" arrive up there prior to leaving for the last trip down here, how long before?

A. Well, how do you mean—do you mean when she left here to go up there?

Q. No, how long was it after the "Three Sisters" arrived in Drake's Bay that she left there for the last trip down here? A. With us?

Q. Yes; was it a day or two, or three days, or what was it?

A. About two days, or two and a half days, or something like that.

Q. Do you remember when she arrived up there for the last time? A. No, I do not.

Q. Were you on the dock at the time she arrived there with Mr. Carlsen and the others?

A. We were working there, yes. [289]

Q. You were working there? A. Yes.

Q. Did you at that time hear the captain of the "Three Sisters" say anything to Mr. Carlsen?

A. Well, he said he came up to take us home. That is all I heard.

Q. Did he ask anything about how long it was going to be before you were finished?

(Testimony of George Reid.)

A. Something to that effect. I didn't pay attention to it, I was working there. I heard them talking something like that.

Q. And then did the "Three Sisters" wait up there until you were ready to come back?

A. Yes.

Q. And when you were finished and were starting to come back did you ask the captain for permission to come back on the "Three Sisters"?

A. No.

Q. Did you help store the luggage on board the "Three Sisters"? A. Yes, sir.

Q. And after you had stored this luggage on the "Three Sisters," where did you stay: Did you stay on the "Three Sisters," or did you go on the barge?

A. After we got the stuff all on we got on the "Three Sisters" and went out to the barge, and he ran alongside of the barge and let four of us off.

Q. What did you do while you were on the barge?

A. We hauled in the anchor that was holding the barge, and took it up, and the deck-hand passed us a tow-line.

Q. What did you do with the tow-line, if anything? A. Threw it over a bitt.

Q. And who, if you know, fixed the tow-line over the other bitt?

A. One of the other men, I don't know who they were.

Q. Don't you remember it was Mr. Trueheart?

A. Trueheart was there. He was on the barge

(Testimony of George Reid.)

with us. There were four or five of us on the barge, I couldn't say who did it.

Q. Did you have anything to do with placing the bridle over [290] the bitts when she was going up there? A. No, sir.

Q. But you did on the return journey?

A. Yes, sir.

Q. Did you notice the condition of the bridle at that time?

A. Well, it looked a little rusty; that is all I noticed; I didn't pay much attention to it.

Q. Did you notice any strands?

A. Yes, there were a few around there where it was made fast to the shackle there, or whatever it is. It was a little rusty, and some of them were broken.

Q. You didn't notice the swivel, did you, or, did you?

A. No, I didn't notice the swivel. The swivel was a little too far away from me. Of course, I didn't pay any attention to that, I was working. They just passed the bridle to make it fast and that is all you had to do. I didn't pay much attention to what was going on.

Q. When you boarded this boat, did the captain say anything to you about what part of the boat you were to remain on or to occupy? A. Not a word.

Q. At any time during this voyage from Point Reyes to San Francisco, did the captain say anything to you about occupying a certain portion of the boat? A. Not a word.

(Testimony of George Reid.)

Q. Where were you during the journey to San Francisco, on what part of the boat were you?

A. On the stern end.

Q. Who was with you, if you know?

A. Mr. Carlsen, Mr. Haney, Mr. Sauder were there for a while; the cook had made coffee and every once in a while—there was a small place to go there—and we went one at a time up there, and a few of us stood around, but just who stood around I could not tell.

Q. Were you sitting down in the after part of the vessel at any time? A. Yes, sir.

Q. What were you doing there?

A. Playing cards.

Q. With whom were you playing cards?

A. Mr. Sauder, Mr. Carlsen, [291] the cook and myself.

Q. The cook is Mr. Lewis?

A. I don't know, I never learned his name.

Q. Or, rather, Mr. Woods.

A. I don't know, I never learned his name.

Q. At that time you were back there, did you hear the captain say anything about anybody being beware of the tow-line? A. Not to my knowledge.

Q. Did you hear him say it at any time to anybody in your presence?

A. Only after the accident occurred he said that was no place for anybody to sit, they ought to have better sense than sit on the stern of the boat.

Q. That was the only thing you heard the captain say?

(Testimony of George Reid.)

A. That was the only thing I heard the captain say.

Q. And that was after the accident?

A. And that was after the accident.

Q. Did you notice the distance that separated the barge from the "Three Sisters" at any time during this journey?

A. Well, that is pretty hard for me to say.

Q. Did you notice the distance, did you notice the barge at any time, did you look back toward the barge?

A. Every once in a while, yes, we would give her the once over, when she bounced around.

Q. What would you say was the extreme distance at any time that separated that barge from the "Three Sisters," just give us your best estimate?

A. Well, I don't know; I am a poor estimator. It might be 150 feet, it might be 175 feet for all I know.

Q. But you would say it was not in excess of 175 feet?

Mr. LILLICK.—Oh, Mr. Heidelberg. If your Honor please, we have had leading questions, of course, but I think that [292] question ought to be stricken out and even a different line of inquiry pursued before it is returned to again.

The COURT.—I don't think it is going to do any harm at all, Mr. Lillick, for the reason that the witness has already said it might be 150 or it might be 175 feet. If he had not already expressed an opinion it might be perhaps improper to permit a lead-

(Testimony of George Reid.)

ing question, but inasmuch as he has, I cannot see that it makes much difference; in other words, supposing he says "Yes," it won't add anything to it or take anything from it.

Mr. HEIDELBERG.—Q. You would say that the extreme distance was not to exceed 175 feet, in your opinion?

A. Well, that is pretty hard to say. I don't know what I would say. Some say 175, some say 200, some say 180. I was just giving you my estimate about it. I would not say "Yes," and I would not say "No."

Q. You did see the barge at various times during the journey down?

A. Yes, and I know the tow-line was pretty tight all the time. I should not think it was over 175 feet, the way the tow-line was.

Q. Did you see any tow-line or rope on any other part of this vessel?

A. Right where the mast, where the bight was made fast, there was quite a coil there.

Q. And that was the part of the tow-line that was left—

Mr. LILLICK.—Now, just a minute. I object to that as leading.

Mr. HEIDELBERG.—Q. That was one continuous line, wasn't it? A. Yes.

Mr. LILLICK.—The same objection.

The COURT.—I will sustain the objection to that. [293]

(Testimony of George Reid.)

Mr. LILLICK.—And may the question and answer go out, your Honor?

The COURT.—Yes.

Mr. HEIDELBERG.—Q. Can you tell us whether or not that part of the line that was on the after deck of the vessel was part of the tow-line, itself? Can you tell that?

A. You mean to say that the coil beneath the post was part of the tow-line?

Q. Yes.

A. You mean that which was made fast to the mast?

Q. Yes. A. Yes.

Q. It was? A. Yes, sir.

A. And can you tell us whether or not any of that was ever paid out at any time, added to the tow-line?

A. Not to my knowledge, it was not.

Q. What did you do with Mr. Carlson after this accident?

A. We pulled him over and got him up against the mast where the line was made fast, and got some mattresses off the top of the house there, and piled them around him, Mr. Sauder and him, and got a bed made for him.

Q. Prior to that time did you do anything with Mr. Carlson in relation to this rope? A. No.

Q. You don't remember that? A. No.

Q. There was quite some excitement about that time, wasn't there? A. Yes.

Q. What did you do, did you help Mr. Sauder, or did you help Mr. Carlson first?

(Testimony of George Reid.)

A. I helped both of them, that is, one at a time. The rest were up forward. Me and the cook were back there alone.

Q. The other fellows came running back after that? A. Yes.

Cross-examination.

Mr. LILLICK.—Q. When you saw the strands of the bridle broken, were the strands that you saw that were broken near [294] the loop that went over the bitt?

A. Well, no, just the end of the splice, the end of the splice that went over the bitt.

The COURT.—Q. Do you mean the end of the thimble?

A. No, the end of the splice, your Honor, right here.

Mr. LILLICK.—Q. Were they like these wires that you see here?

A. They were spliced, and some of those strands were broke out here.

Q. I call your attention to these wires here; did it appear to be like those wires, there?

A. No, that is just the end stuck in there; it was not there at all, it was up in here.

Q. Did the rope appear to be weak to you?

A. It appeared to be pretty rusty, as if it had been down in the hold of the boat for some time, and they took it out on that trip.

Q. How do you know that it had been down in the hold of the boat for some time? Did you hear that this morning?

(Testimony of George Reid.)

A. No. That is the way I thought it was.

Q. How did you know that it had been down in the hold of the boat?

A. Because there was rust on it, and heat in the hold of the boat would do that.

Q. What is your business besides pile-driving?

A. None.

Q. How long have you been pile-driving?

A. Since 1907.

Q. How old are you? A. Forty-two.

Q. How long have you known Mr. Carlsen and Mr. Sauder? A. About ten years.

Q. Are you a family man? A. No.

Q. Are your families friends? A. No, sir.

Q. Your family doesn't know their family?

A. No, sir.

Q. Have you ever called at their houses?

A. No, sir.

Q. Did you help Evans haul in the hawser after it was broken? A. No, sir.

Q. Did you notice the hawser at all after it was hauled in on [295] the "Three Sisters"?

A. Just took a glance at it and seen where it was broke.

Q. Where was it broken?

A. About a foot or so from the swivel, there, and about—well, I would not say whether it was two feet, or a dozen feet, or a million feet, or at all, but it was broke somewhere near the eye on the other bitt. I don't know whether it was the starboard side or the port side, but it was one side.

(Testimony of George Reid.)

Q. How long was the bridle on each side after it was broken, giving your measurement from the eye to which it was attached?

A. That is pretty hard to say, too; it might be about six feet and it might be ten feet; I could not tell you, though.

Q. That is one side; on the other side, how far would you say? A. Probably five feet.

Q. How long was the bridle when it was first affixed? A. I don't know.

Q. You don't know how long either side of the bridle was from the main shackle? A. No, sir.

Q. Thirty feet?

A. I would not say, I don't know.

Q. Fifty feet? A. I don't know.

Q. You have no idea? A. I have no idea.

Q. How wide was the front end of the barge on which the bitts were

A. Probably 30 feet, not over 30 feet.

Q. How long was the barge? A. I don't know.

Q. What is your best recollection as to the length of the barge? A. Maybe 60 feet.

Q. Did you notice any other rope on the "Three Sisters" besides the hawser?

A. No, only a short piece on the bow that we tied up to Meiggs' Wharf with.

Q. How long was that piece? A. I don't know.

Q. You saw it on this occasion?

A. I saw it. It was probably [296] 10 feet from the bitt up to the top of the wharf.

(Testimony of George Reid.)

Q. Are you speaking of the total length of the line?

A. No. The total length of the line I don't know.

Q. How long was the line?

A. I don't know; it was wrapped around the bitt.

Q. You didn't see it on the bitt before that time?

A. No.

Q. So you didn't see any other rope on the deck of the "Three Sisters" but this hawser? A. No.

Q. Was the door into the engine-room open while you were on the "Three Sisters"?

A. Do you mean on top of the house?

Q. Yes. A. Yes.

Q. All of the time?

A. Well, I couldn't swear to that, whether it was all of the time, or not, but I know the captain was going in and out of there quite a few times. I don't know.

Q. Was the hatch closed on the after deck, or was it open? A. It was closed.

Q. Do you know why the boys didn't put some of their things in the hold aft?

A. I could not tell you.

Q. In what position were you while you were playing cards? A. Sitting down on the deck.

Q. With reference to which of you with your back to the bow and which of you with your back to the stern?

A. There was only one man that I know of had his back to the stern, and that was Mr. Carlsen.

Q. And in what relation to him were you?

(Testimony of George Reid.)

A. Opposite.

Q. Were you and he playing partners?

A. Yes; me and him were playing partners.

Q. You were playing partners? A. Yes.

Q. What was it you were playing?

A. I think it was whist we were playing.

Q. Do you remember on which side of you Mr. Sauder was? [297]

A. He was sitting on the opposite side of me.

Q. Who was sitting opposite? A. Mr. Sauder.

Q. Opposite of whom?

A. Opposite the cook, and opposite me, to. The cook was sitting here, and Mr. Sauder was sitting here.

Q. Which of them was nearer the line?

A. Both of them were pretty near the line.

Q. By that, do you mean the cook and Carlsen, or the cook and Sauder?

A. Me and Sauder were the closest to the line.

Q. How is it that you were not hit?

A. The blow on Mr. Sauder took it away from me. Mr. Sauder stopped me from getting hit. It picked him right up on his feet and knocked him against the rail—it pretty near knocked him over.

Q. The blow came from the rear instead of from the side. A. Yes.

Q. The line came in?

A. It just whipped like that.

Q. How much of a sway was there to that line before it broke?

(Testimony of George Reid.)

A. Not a great deal; a steady strain, a steady strain, tight; the line was tight.

Q. Wasn't the line between the mast and the after portion of the "Three Sisters" going with the boat—a steady strain on the line and straight, but the boat moving and apparently making the line play back and forth? A. Not over six inches either way.

Q. You mean at the point where you were sitting?

A. At the point where I was sitting.

Q. Did you see the barge roll at all during the tow?

A. Not only when the line broke.

Q. Did you notice any water on the deck of the "Three Sisters"? A. No.

Q. Where were you when Kruger put out the line, lengthened out the tow?

A. I didn't notice Kruger lengthen the tow at all.

Q. Do you know when the line was lengthened?

A. No. [298]

Q. When did you first get on the launch?

A. When Mr. Carlsen hollered that we were ready to go and for him to come over, and so the captain came over.

Q. Was that after you had put the bridle over the bitt?

A. Oh, no, that was when we were all done with the job and everything was all fixed up to go home. All we had to do was to go to Booth's wharf and load up our stuff and come back and hook on the driver and go.

(Testimony of George Reid.)

Q. You got up on the barge, didn't you, to put the bridle over the bitts?

A. Four men had to be on the barge to take in the anchors.

Q. And you were one of those men? A. Yes.

Q. When did you get on the "Three Sisters"?

A. When we started out a little ways and got everything fast on board.

Q. That was before you started away from the pier at all? A. Oh, no.

Q. Tell me when it was. Was it before you got out and stopped at the bell buoy?

A. We did not stop at the bell buoy at all.

Q. You didn't stop at the bell buoy?

A. No, sir.

Q. When was it with relation to the actual starting of the voyage with the launch ahead of the barge and under way that you got on the barge?

A. I have already told you when we got on the barge. When we got our stuff—I beg your pardon, I don't mean the barge, I mean the "Three Sisters." I could not tell you just when it was, or how long it was; I don't know what time it was, or how long we were on the barge, or anything like that, but I know we got on.

Q. And after you started you don't know where you went on the "Three Sisters" up to the time you started to play cards, do you?

A. We crawled along the side, the side that was the clearest, and we went up and got some coffee.

[299]

(Testimony of George Reid.)

Q. You went up and got some coffee, too?

A. Yes.

Q. All the boys stood around and had their coffee?

A. No, there was not room for all of them up there; there was not very much space there after you had the stove on there, and a lot more stuff.

Q. You know that two of your men were there at the window talking to Anderson while the tow was being made; you know that, don't you?

A. No, I don't know that.

Q. You don't know that? A. No.

Q. Where do you place the various men who were on the "Three Sisters" belonging to your crew, Carlsen and your crew, where do you place them at the moment that the line broke?

A. Carlsen was sitting on the stern, and I was sitting opposite him. Mr. Sauder was sitting underneath the tow-line, and the cook was sitting across from him.

Q. That accounts for four of you. A. Yes.

Q. Where were the rest? A. I don't know.

Q. Did you see the others at any time after you got on the launch except when you went up to have coffee? A. Yes, I seen them all.

Q. But you don't know where you saw them?

A. No, I didn't pay attention; they were all walking around there, back and forth, with a cup of coffee in their hand, eating, and chewing the fat with each other.

Q. All over the boat? A. Yes.

(Testimony of George Reid.)

Q. And some up on top of the house where the blankets were?

A. No; there was no room up there for anybody.

Q. You don't think there was room to sit up there?

A. No, there was no room to sit up there. They couldn't sit up there very well. If the boat gave a roll they would sheer off.

Q. The boat was wobbly, was it?

A. Well, no, the boat wasn't [300] wobble, that is, it didn't wobble from one side to the other, but a person being up there on the mattress, you couldn't very well stay up there. It was kind of windy there, too.

Q. Do you, by saying that the line was pretty tight, mean that the tow-line was not in the water, at all? A. Not that I noticed.

Q. So that after you left—you don't know that you passed the buoy out there and they lengthened the line, do you? A. No.

Q. You don't know that they towed a part of the way with a line 50 or 60 feet long and then for the balance of the way, up to the time of the accident, with a line very much longer than that, do you? A. No, I don't.

Q. You have no recollection of that, at all?

A. No, sir.

Q. Have you any recollection of having looked back at the barge, before the accident, and while you were playing cards?

(Testimony of George Reid.)

A. Well, I was sitting like this, and every once in a while I would take a glance at the barge.

Q. You paid no attention to how far she was at that time, did you? A. No.

Q. It was just a passing glance you took, just as you would take a glance at a passing sea gull, for instance? A. Yes.

Q. And undoubtedly you did pass some of the gulls, didn't you? A. Yes.

Q. Did you have any occasion to notice how far they were away? A. No, I didn't.

The COURT.—We will suspend now. The further hearing of this case will go over until next Tuesday at ten o'clock.

(An adjournment was here taken until Tuesday, August 12, 1924, at ten o'clock A. M.) [301]

Tuesday, August 12, 1924.

GEORGE REID, cross-examination (resumed).

Mr. LILLICK.—Q. Mr. Reid, when you testified the other day in commenting upon the strands that you said were broken, you said there were a few around there where it was made fast to the shackle, there, or whatever it is. What did you mean by that, what portion of the bridle?

A. Up a little ways from the splice, there.

Q. Do you mean near the swivel?

A. No, up this way, up around in here.

Q. So that it was some distance back of the splice that was nearest the swivel? A. Yes.

The COURT.—But that is not where it broke,

(Testimony of George Reid.)

at all, was it? I think the evidence is that one of the breaks was a very short distance from the thimble, and the other one was back nearer the bitt.

Mr. LILLICK.—That is partly what I had in mind, your Honor, and I am going to try to get this witness' recollection of where the broken strands were in the wire, and then check one with the other.

Q. It is my recollection that you said that you had no remembrance of the line after it was pulled in on the launch? A. No, sir.

Q. So that after the accident you paid no particular attention to where the bridle, itself, broke?

A. No, sir.

Q. You could not tell whether it was next the bitt on the barge, or whether it was next the shackle, could you? A. No, I could not.

Q. Did you help Evans when he pulled that line in? A. No, sir. [302]

Q. Do you know whether the line was wet when it was pulled in? A. Yes.

Q. It was wet? A. Yes.

Q. So you did pay that much attention to it, didn't you?

A. Yes, I just happened to look up when I was helping to get one of the fellows out of the way.

Q. Had you noticed before that as the swells came by they touched the line as it was in the water, between the barge and the launch?

A. No, I did not.

(Testimony of George Reid.)

Q. So you don't know whether the line was wet before, or not? A. No, I do not.

Q. Would you say, then, that with the distance which you believe the barge to be away from the launch, that the hawser, itself, would be wet or would not be wet before the accident?

A. Well, it did not look as if it would be wet.

Q. So that, speaking now from your recollection of the situation and the distance which you remember the barge to have been away, you would say that that hawser, during the towing and up to the time of the accident, had not been wet: Is that your testimony?

A. It is pretty hard to say about that.

Q. What is your best recollection, Mr. Reid?

A. Well, I don't know.

Q. The fact is you don't know whether that hawser was dragging in the water, or whether it was not, do you? A. No, I don't.

Q. In your testimony the other day you were asked this question:

> "Q. Did you notice the distance, did you notice the barge at any time, did you look back toward the barge? A. Every once in a while, yes, we would give her the once over when she bounced around."

By that you meant she was sheering the towline, don't you, going from one side to the other?

A. No, just up and down over the [303] ground swells.

Q. Just up and down? A. Yes.

(Testimony of George Reid.)

Q. What is your recollection as to her side motion; wasn't she sheering from one side to the other?

A. Not until the bridle broke.

Q. Have you been on many tows of that character? A. No, sir.

Q. Is this the only one upon which you ever were on? A. Yes.

Q. You know, do you not, that the barge had no rudder? A. Yes.

Q. You are used to working around the water on a pile-driver, aren't you? A. Yes.

Q. That means working here on the bay, on smooth water? A. Yes.

Q. And you have been towed back and forth on smooth water on many occasions, have you not?

A. Yes.

Q. And on barges of a smaller character, without any rudder? A. Not quite as big as that.

Q. On a smaller barge? A. Yes.

Q. But without a rudder? A. Yes.

Q. Even on those smaller barges, when they have no rudder they sheer in smooth water, don't they?

A. Without a bridle they do, yes.

Q. And with a bridle don't they?

A. Not very much.

Q. In your testimony the other day, Mr. Reid, you said that with reference to the distance the barge was away: "Well, that is pretty hard to say, I don't know what I would say, some say 175, some 200, some say 180." Whom did you mean when you said, "Some say 175, some say 200, some say

(Testimony of George Reid.)

180." Were you talking it over with someone before you went on the witness-stand? A. No, sir.

Q. Where did you get that expression, "Some say 175," what did you mean by that?

A. What I meant by it is that that is the [304] expression that some men would give in giving that description, not that I heard anybody say that, or that anybody did say it, except myself. That is only my judgment about it. Of course, I never measured it, and I don't know for sure.

Q. Then your explanation of "Some say 175, some say 200," is that one man would say it was 175 feet, and another man would say it was 200 feet? A. Yes.

Q. And another man might say it was 150, might he not, in the same way? A. Yes.

The COURT.—What significance, Mr. Lillick, has the length of the line in this particular proceeding?

Mr. LILLICK.—My own theory of the case is this, your Honor: That if we provided for the vessel a bridle and a tow-line of sufficient strength, that regardless of what the distance the barge was from the launch it is no concern of ours in the limitation proceeding, because we had furnished proper equipment, and if the captain did not use it properly that has no bearing on our right to limit.

The COURT.—Then why are we spending so much time on it?

Mr. LILLICK.—But that is my theory, your Honor. Opposed to it is the contention of the

other side, that the tow-line was so short that the accident occurred through the manner in which the tow was made up, and it being a tort, and there being no contractual liability, we are under the burden of explaining to the Court every possible theory under which the line might have broken. It may be that I am going too far in support of my own theory. I think that my own theory is correct. That is my understanding of the situation. Mr. Lingenfelter has another reason which he would like to state to your Honor.

The COURT.—Very well. [305]

Mr. LINGENFELTER.—My own explanation of the materiality of that is on the second aspect of the case. We are not only asking to limit our liability, if we be found liable here, but we are asking to be relieved from all responsibility by reason of this particular towage accident. On the first question, that of the right to limit, our privity and knowledge is the issue. On the second, the issue of fault, the case should be viewed as if it were that of an ordinary marine tort. Then the acts of the master and others in charge of the vessel become very pertinent, and it becomes pertinent as to whether or not the master used a sufficient tow-line as to length, and a sufficiently reasonable safe and proper bridle.

The COURT.—Is it not the proper practice to consider that matter in the event of a limitation? Isn't it the proper practice to consider that matter

after the matter has been referred on the question of the claims?

Mr. LINGENFELTER.—The practice, as I understand it, from Benedit—and I will say that that is the only authority I have looked into in the matter—is that in theory the two are separate, but in practice the Court hears both. If the Court holds that the petitioner is at fault, then, of course, a reference is made; if, on the other hand, the Court holds that the petitioner is not at fault, the Court enters a decree accordingly, and there is no reference to the Commissioner, because the Commissioner has no loss to ascertain.

Mr. HEIDELBERG.—Our theory of the matter is that if they had a totally insufficient bridle aboard, and had a totally insufficient tow-line aboard, and did not have the length required, then the vessel would be unseaworthy as without the proper equipment. [306]

The COURT.—But that has nothing to do with the question that I asked, the amount that was out. Your own testimony here certainly shows, taking your own testimony from the most favorable point of view, that there was a very large amount of tow-line which was coiled at the foot of the mast, just aft of the house. Your own witnesses have testified to that. So I do not see that that has very much to do with it. I am trying to figure out some way to shorten this, if I can.

Mr. HEIDELBERG.—We claim that even conceding that they had all the tow-line on board which

(Testimony of George Reid.)

they say they had on board, it was yet insufficient in length.

Mr. LINGENFELTER.—The case which Mr. Bell read to the Court in his opening statement—what case was that, Mr. Bell, was it in 291 Federal?

Mr. BELL.—As to the matter of practice?

Mr. LINGENFELTER.—Yes.

Mr. BELL.—I think that was the Hewitt case.

Mr. LINGENFELTER.—Yes, the Hewitt case. That case outlines the ordinary practice in these matters, and I think it sustains me in my position in regard to the double aspect of the case. Isn't that correct, Mr. Bell?

Mr. BELL.—I think that what Mr. Lingenfelter stated is substantially correct.

The COURT.—Well, if you gentlemen agree on it I will decide both matters. You do agree, do you?

Mr. BELL.—I think that Mr. Lingenfelter's statement is in substance what Mr. Benedict says about it. That seems to be the accepted practice.

The COURT.—All right, you may go ahead.

Mr. LILLICK.—Q. You said the other day that Mr. Sauder was [307] sitting underneath the tow-line. Will you explain that a little more fully, Mr. Reid, where the men were sitting with relation to the tow-line while they were playing cards?

A. Yes. Mr. Sauder was sitting back, with his back to the tow-line.

Q. I am reading to you from your testimony of the other day:

(Testimony of George Reid.)

"Q. Where do you place the various men who were on the 'Three Sisters' belonging to your crew, Carlsen and your crew, where do you place them at the moment that the line broke?

"A. Carlsen was sitting on the stern, and I was sitting opposite him. Mr. Sauder was sitting underneath the tow-line, and the cook was sitting across from him."

As I understand that answer, it indicates that Mr. Carlsen was sitting with his back to the stern, on that little grating; you were sitting opposite him; Mr. Sauder was sitting near to the port side and underneath the tow-line, and the cook, or the other man, nearer the rail; is that correct, or isn't it?

A. Yes, that is it.

Q. That tow-line, then, was swinging either over Sauder's head or behind his head, but a few inches away, wasn't it? A. Yes.

Q. You don't think that was a safe place, do you, for him to be? A. Well, I don't know—

Mr. HEIDELBERG.—Just a moment. If the answer is in, your Honor, I ask that it be stricken out for the purpose of my objection.

The COURT.—All right.

Mr. HEIDELBERG.—I object to that question as improper.

The COURT.—Well, let it go out, if the answer is in, whatever it is, and I will sustain the objection. What the witness thinks about it is not of very much importance.

Mr. LILLICK.—I really think so, myself, your

(Testimony of George Reid.)

Honor, but that sort of a question follows in a man's mind, usually. It is, [308] I should take it to be, a self-evident fact.

Q. Can you tell me when you first saw Barge 61 during the time this work was going on, whether you saw it at the pier, or whether you first saw it up at Point Reyes?

A. I helped to load some of it down at Pier 46.

Q. So that you saw this bridle down at Pier 46, didn't you? A. No, sir, I didn't.

Q. Was it there?

A. No, sir, it was not there at the time, at all.

Q. What time were you down there at Pier 46?

A. About half past five.

Q. On that morning?

A. No, not that morning. I was not there that morning at all at Pier 46. I left there that evening.

Q. What day was it you were around there at about five o'clock?

A. The day we loaded the barge, whatever day that was.

Q. And it is your testimony that the bridle was not on the barge at that time? A. It was not.

Q. Are you sure of that? A. Yes.

The COURT.—Q. By loading it, you mean loading the piles on her? A. Yes.

Mr. LILLICK.—Q. How many piles did she have on her on the way up?

A. I couldn't tell you that. The piles were on her before we went down there.

(Testimony of George Reid.)

Q. She was much heavier on her up trip than she was on the down trip, wasn't she? A. Yes.

Q. All the piles were off?

A. You mean coming back?

Q. Yes.

A. I think she had some on her coming down, but I don't know how many.

Q. Have you no recollection about that?

A. No, sir.

Q. You don't know how many were piled across the deck, or in the way or not in the way?

A. No, sir. [309]

Q. Did she have any water for her donkey-engine?

A. I couldn't tell you that, I didn't pay that much attention.

Q. She had a donkey-engine on her, didn't she?

A. Yes.

Mr. LILLICK.—That is all.

Redirect Examination.

Mr. HEIDELBERG.—Q. How wide is the "Three Sisters" at the stern? A. I don't know.

Q. If you were told that the "Three Sisters" was 18 feet wide in the back, and the tow-line was stretched from the mast over the center of the stern of the boat, how far would you say that Mr. Sauder was sitting from the tow-line?

The COURT.—It is perfectly evident that he could not have been sitting the same distance from the tow-line at all times, because, of course, in the course they were going, and the direction in which

(Testimony of George Reid.)

the ground swells were coming, that tow-line would swing, and it would not be the same at all times. I don't think anybody could answer that question.

Mr. HEIDELBERG.—I will withdraw that question.

Q. When you were playing cards, what was the closest that Mr. Sauder was ever sitting to the tow-line, if you know?

A. I don't know, I could not explain that at all.

Q. Did the captain come back to the stern of the boat at any time while you were there?

A. Not that I noted.

Q. Do you remember any incident there in relation to any fish?

A. They had some fish aboard, I know, and the captain and Mr. Carlsen were talking about some fish, but I don't know what they done.

Q. Did you see the captain do anything about the fish?

A. No, I could not say that I did. [310]

Mr. LINGENFELTER.—May we put a witness on out of order?

Mr. HEIDELBERG.—Yes.

Mr. LILLICK.—If your Honor please, we were asked the other day for the license of the vessel. We have it here. We offer a certified copy in evidence. It gives the definite dimensions of the barge.

(The document was here marked Petitioner's Exhibit 3.)

TESTIMONY OF ERNEST MOHR, FOR PETITIONER.

ERNEST MOHR, called for the petitioner (out of order), sworn.

Mr. LINGENFELTER.—Q. What is your name?

A. Ernest Mohr.

Q. Where do you reside?

A. 719 Faxon Avenue.

Q. How old are you? A. 34.

Q. What is your occupation?

A. Master and pilot of steam vessels.

Q. What licenses do you hold, if any?

A. Master and pilot, San Francisco Bay and tributaries, to sea and return.

Q. What waters do those licenses entitle you to ply upon?

A. San Francisco Bay and tributaries, to sea, anywheres, unlimited distance in the meaning of towing to sea.

Q. What has been your towing experience? Just explain it in your own words.

A. I have towed ships from San Francisco Bay to the Farallone Islands, Point Reyes, Montara, Point Sur, and to Monterey.

Q. For how many years have you been engaged in towing? A. 15 years.

Q. What is your principal work upon the high seas now at the present time? A. Towing vessels.

Q. Have you had any experience in towing barges? A. Yes, sir.

(Testimony of Ernest Mohr.)

Q. Are you acquainted with Crowley's Barge 61?

A. Yes, sir.

Q. Do you know that barge?

A. Yes, sir. [311]

Q. Have you ever towed her? A. Yes, sir.

Q. Are you familiar with the "Three Sisters," the vessel mentioned in this proceeding?

A. I have seen her, yes.

Q. Have you ever towed barges of the dimensions of Crowley's Barge 61? A. Yes, sir.

Q. Have you towed Crowley's Barge 61?

A. Yes, sir.

Q. Have you ever towed vessels of the character of the "Three Sisters"? A. Yes, sir.

Q. In the particular waters between Drake's Bay and San Francisco, have you towed over that particular course? A. Yes, sir.

Q. How many times?

A. Anywheres from ten to sixty times.

Q. Have you ever towed Crowley's 61 over that particular course? A. No, sir.

Q. Have you towed any barges of the character of Crowley's 61 over that particular course?

A. Yes.

Q. How many times, would you say?

A. About half a dozen times, on different occasions.

Q. Were any of those half dozen voyages made with a tug of the character of the "Three Sisters"?

A. Something similar to her.

Q. With greater or lesser horse-power than the

(Testimony of Ernest Mohr.)

"Three Sisters"? For that purpose I will state to you that the horse-power of the "Three Sisters" has been fixed by the evidence in this case at 135.

A. The horse-power of the boats I have been on in that location is 110 horse-power, a 65-foot launch.

Q. Captain, before you here you will see a bridle. On the half dozen voyages you have mentioned as having made from Drake's Bay to San Francisco, did you use a bridle of that general character on any of those voyages?

A. Very similar to the same.

Q. What are the dimensions of the cable used in the legs of [312] the bridle you used on those voyages?

A. I believe it was a 5/8 or a 7/8 wire, I don't quite remember.

Q. Did the bridle that you used on those voyages have swivels? A. Yes, sir.

Q. I will ask you to step down here a moment, if you will, and examine this swivel which is upon the bridle which is before you, and the swivel which is upon the physical object marked Exhibit "A"; have you observed those? A. Yes.

Q. Which type of swivel did the bridles which you used on those six voyages have?

A. Similar to these.

Q. Well, which one? Those two are different, Captain, if you will observe. Which type was used by you? A. We used both types.

Q. Have you used, in towing barges on any other voyages than the six you have mentioned as having

(Testimony of Ernest Mohr.)

made from Drake's Bay to San Francisco, have you used bridles? A. Yes, sir.

Q. When and where? Go ahead and tell us your experience in towing barges with bridles of the character of the one before you, here?

A. I towed a Government barge with a radio supply to Farallone Islands, with the steam tug "Crowley No. 3."

Q. Did you use a bridle on that occasion?

A. A bridle, yes.

The COURT.—Q. Are you with the Crowley Company now?

A. I am with the Shipowners & Merchants Tugboat Company, but I have been with the Crowley Company.

Mr. LINGENFELTER.—Q. Have you any connection with the Red Stack Tugboat Company at the present time? A. Yes.

Q. What connection?

A. I am employed as master and pilot.

Q. The principal business of that company is towing on the high seas, isn't it?

A. It is towing, yes.

Q. Captain, I am about to address a hypothetical question to [313] you, and I will ask you to assume the following facts:

Assume that a tug in tow were proceeding from the bell buoy outside of Drake's Bay to the port of San Francisco, upon a due course from the bell buoy to Drake's Bay, to the buoy off Duxburry Reef, that course being east by south, by half south;

(Testimony of Ernest Mohr.)

assume that the tug was the "Three Sisters," she being a vessel of 135 horse-power, of the dimensions shown by her certificate of registration, 56 feet long by 15.6 feet beam, and manned by a master and one deck-hand; that the tow was a square-deck barge, Crowley's barge No. 61, having no rudder, and having a deck cargo composed of a pile-driver and a donkey-engine and some spars; that there was employed in making this tow a 7-inch manila hawser of from 400 to 500 feet in length; this hawser was made fast to the mast of the "Three Sisters"; it was connected with the barge by being tied into a thimble connected with the swivel of a bridle on the barge; the bridle was a 7/8-inch or a 3/4-inch steel cable, the legs being approximately 35 feet each, making a total length of approximately 70 feet; the ends were looped, and the loops were placed over the towing bitts of the barge. The time was on the afternoon of June 8, 1923. The weather was fair; the wind was light northwesterly; the sea was smooth except for westerly ground swells of the kind usually encountered in those waters at that time of the year. Captain, would you consider the use of the tow-line and the bridle safe and proper in making that tow under the circumstances I have mentioned in the hypothetical statement to you?

A. Yes.

Q. What, in your opinion, would be the shortest seven-inch manila hawser which it would be safe and proper to use in making that tow, with the bridle I have described and the barge [314] I

(Testimony of Ernest Mohr.)

have described, and the ship I have described, and assuming the other facts stated in the hypothetical question?

A. I would not have it less than 350 or 400 feet.

Q. Would a vessel upon the course that I have mentioned in the hypothetical question be taking the sea by the bow?

A. No, sir. You mean running before the wind, don't you?

Q. Yes. A. No, it would not.

Q. Has it been your experience in towing, Captain, that there are inevitable accidents for which you cannot account?

Mr. HEIDELBERG.—That is objected to as being immaterial, irrelevant and incompetent.

The COURT.—Yes, I cannot see how that is material. Unless you have something to urge on that, Mr. Lengenfelter, I cannot see how it is proper.

Mr. LINGENFELTER.—Q. Captain, under what circumstances does reasonably proper and safe towing equipment break?

Mr. HEIDELBERG.—That is objected to also.

Mr. LINGENFELTER.—Your Honor, I am trying to get at the possible causes of breakage. One of the cases that Mr Bell urged holds that in a situation such as we have presented to us, here, that the petitioner must account for certain possible causes of breakage. It is my purpose to develop by this witness the usual accountable causes for breakage under tow.

The COURT.—I will allow the question.

(Testimony of Ernest Mohr.)

A. By cross seas, or by a tow, or a launch, or a tug being in different positions, such as the barge being up in one sea and the tug being down in the other.

Mr. LINGENFELTER.—Q. Is it or is it not the fact that the best and safest possible equipment breaks under such circumstances as you have mentioned? [315]

Mr. HEIDELBERG.—That is objected to as being immaterial, irrelevant and incompetent.

The COURT.—Well, I will allow it. It seems to me, though, it is a matter of pure common sense. The object of an expert in admiralty is to inform the Court as to matters of the sea, but the Court has sense enough to see that there will be an additional strain if the tow is going down one side of the swell and the tug is coming up on the other side. It doesn't take a great deal of sense to know that.

Mr. LINGENFELTER.—Out of deference to your Honor's views I will withdraw the question.

Q. Captain, in towing, do you ever permit anyone to remain at the stern of the tug? A. No, sir.

Q. Do you regard the stern of the tug under tow as being a safe and proper place for a man to be, with a view to his personal safety?

Mr. HEIDELBERG.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Let him answer.

A. No, sir.

Mr. LINGENFELTER.—Q. Do you know whether or not swivels of the description I have

(Testimony of Ernest Mohr.)

mentioned in the hypothetical question are used in towing rudderless barges by the Red Stack Tugboat Company? A. Yes.

Q. And what percentage of the towing out of this port would you say the Red Stack Company does? A. 95 per cent.

Cross-examination.

Mr. HEIDELBERG.—Q. Captain, by whom are you employed at the present time?

A. The Shipowners & Merchants Tugboat Co.

Q. Who is the president of that concern?

A. Thomas Crowley. [316]

Q. Is he the same Crowley who is the president of the Crowley Launch & Tugboat Company?

A. Yes, sir.

Q. And he was your former employer while you were working for the Crowley Launch & Tugboat Company? A. Yes.

Q. Do you give any preference to the kind of swivels you use, distinguishing between a swivel which has a play at both ends, similar to Claimant's Exhibit "A," and one which only has a play at one end?

A. Either swivel may be used, either swivel is competent to perform the service which you use a swivel for.

Q. Before you make a tow, as captain, you always examine your swivel, don't you, to see whether or not it is in working order? A. Yes.

Q. You would not use a swivel which was frozen or rusted up fast, would you?

(Testimony of Ernest Mohr.)

A. A swivel that is frozen or rusted up, I always try to put it back in function.

Q. If a swivel is in that condition, it would lay up turns on the bridle wire, wouldn't it?

A. Not necessarily.

Q. If the swivel did not turn, Captain, it would cause the legs of the bridle to wrap around each other, wouldn't it? A. To a certain extent, yes.

Q. And that would cause chafing of the wires, wouldn't it? A. Not necessarily.

Q. If the swivel was not working, and if turns came in the rope, would it not cause those turns to go into the bridle?

A. If the swivel was not working, if there are turns in the rope, the tow-line, yes.

Q. It would cause them to go into the bridle?

A. It would cause them to go into the bridle, yes.

Q. And that would cause the bridle legs, as they are called, to wrap around each other, wouldn't it?

A. Yes. [317]

Q. And that would cause chafing, wouldn't it?

A. I don't think it would cause any chafing, because it is laying tight, and it is laying like a piece of rope.

Q. Those turns would come out, wouldn't they, on a pull? A. On a pull, yes.

Q. And this laying up and unlaying of the bridle legs on each other, and chafing, would have a tendency to make that bridle break, wouldn't it?

A. I never had any experience to that effect.

(Testimony of Ernest Mohr.)

The only swivel we ever used always performed its duty, that is, in that respect, it turned.

Q. As an expert, though, Captain, you know that the very function of the swivel is to keep the bridle legs separate from each other, and also to take the turns out of the hemp rope; that is true, isn't it?

A. Yes.

Q. And you would do that because of the fact that if they lay up on each other, and unlay, it would have a tendency to make them wear out?

A. It has a tendency to shorten up your bridle. That is the only reason I know of why we always use a swivel.

Q. Would not the chafing of the wire, one on the other of the different legs, wouldn't it have a tendency to cause that bridle to break quicker than if the legs were pulling separate from each other?

A. I really don't know. The twisting of the wire bridle, with a certain strain on it, would prevent it from chafing.

Q. If these bridle legs twisted around each other, and then twisted back, it would have a tendency to chafe and to wear out, wouldn't it?

A. Yes, if the bridle kept on turning in and out it would, yes.

Q. Is it your policy and your experience that you tie the bight of a tow-line to a mast or bitts?

A. Yes. [318]

Q. Do you not let all the tow-line you have out? Say, for instance, if you had only 400 feet of rope

(Testimony of Ernest Mohr.)

on board, or 425 feet, or 450 feet of rope on board, you would let out all that rope, wouldn't you?

A. I would not; no.

Q. Is it not a fact that a longer rope, with long ground swells, is a safer towing apparatus than a short tow-rope?

A. It all depends on the size of your tow.

Q. Say you had barge 61, loaded with a pile-driving outfit, would you not consider that the longer tow-rope you had, up to 125 fathoms, would be better than a tow-rope of 350 feet, for instance?

A. Well, that is a matter of opinion.

Q. It would depend greatly, would it not, Captain, on the length of the ground swells?

A. Yes, absolutely.

Q. Of course, you don't know anything about the length of these ground swells on this occasion, do you, other than that they were long ground swells?

A. Of course, I was not there, and I could not say how long the ground swells were. The average ground swell is long enough and short enough to permit an average tow-line of 300 or 400 feet.

Q. It is a fact, Captain, is it not, that you try to keep a tow-line long enough so that the bight of the tow-line will always be in the water? A. Yes.

Q. You don't advocate towing at any time with so short a rope that the bight will be out of the water, especially where you are towing with long ground swells; you don't advocate towing with such a short rope that the bight of that tow-rope will be out of water, do you?

(Testimony of Ernest Mohr.)

A. The bight of the tow-rope between a tow and a launch, it does not take much to keep it in the water.

Q. No, it doesn't take much to keep it in the water, but you would say that the safer thing to do would be to have a tow-line [319] of sufficient length so that the bight of that tow-line will always be in the water; that is true, isn't it?

A. I would not say always. In my experience in towing big ships, we have 125 fathoms of tow-line, with 30 fathoms of wire on the end, and we draw the bight of that out of the water.

Q. But that is towing a vessel that has a sharp prow, isn't it? A. Yes.

Q. And that vessel stands high out of the water at the bow, doesn't it?

A. An empty ship is high out of the water, yes.

Q. Much higher than a barge? A. Yes.

Q. And that, of course, would have a tendency to raise the bight of the tow-line? A. Yes.

Q. The sharpness of the prow of the vessel would have a tendency to cut the resistance of the water against that tow?

A. Well, I don't know. For instance, towing a sailing ship, and she draws 25 feet of water, I don't think the resistance would be less than towing a barge that only draws two or three feet of water.

Q. But would not the width of the bow have a great deal to do with the resistance of the water?

A. Not to any extent.

Q. Not to any extent? A. No.

(Testimony of Ernest Mohr.)

Q. And you mean to say that the prow of a vessel is not made for the purpose of cutting the water and of lessening the resistance?

A. Yes, it is made to cut the resistance.

Q. And a barge is made square across the front end, isn't it? A. Yes.

Q. When you were told that this bridle was 35 feet, making a distance of 70 feet, that, of course, meant the spread of that bridle, didn't it?

A. The spread of the bridle, yes; each part of the bridle was about 30 or 35 feet. [320]

Q. And, of course, you presumed, in answering the question that was put to you, that the bridle and the swivel were in perfect condition?

A. Yes, sir.

Q. As a matter of fact, you had gone over this question before with Mr. Lingenfelter, and you answered it for him before you came into this court, didn't you? A. No.

Q. Do you mean to say you didn't talk with Mr. Lingenfelter about your testimony before you came into this court, to-day?

A. Mr. Lingenfelter asked me what I thought about a swivel.

Q. Is that all he asked you?

A. And what I thought about the bridle.

The COURT.—I don't care whether he talked to him, or not. Any lawyer that does not talk to his witness before putting him on the stand is not doing his duty.

(Testimony of Ernest Mohr.)

Mr. HEIDELBERG.—I agree with your Honor thoroughly on that. I would not think of putting a witness on the stand that I had not talked to before. But on a hypothetical question, the situation is somewhat different.

Q. If you knew that this bridle broke, and not the hawser, and that the tow-rope, or the hawser, flew back, or doubled back over the stern of the boat, how long would you say that that rope could have been and still have doubled back over the stern of the boat?

The COURT.—I don't know what you mean by that question.

Mr. HEIDELBERG.—Q. Calling your attention to the fact that it was not the hawser that broke, but that the bridle broke in two different places, leaving the swivel and part of the bridle still on the tow-rope; if you were told that not withstanding the fact that this apparatus broke at that particular place, that the tow-rope doubled back over the stern of the boat and struck two men there, how long would you say that this hawser could [321] have been and still have doubled back like that?

Mr. LINGENFELTER.—I desire to object to that question on the ground that the hypothesis assumed does not appear in the evidence. There is nothing in the evidence about this line whipping back across the deck.

The COURT.—I think there is, but I don't know what counsel means by doubling back.

Mr. HEIDELBERG.—I mean that the hawser

doubled back over the back of the boat, that it snapped back.

The COURT.—You don't mean that the end of it which was attached to the bridle snapped back?

Mr. HEIDELBERG.—I am putting it in the alternative, your Honor, because nobody knows that.

The COURT.—Of course, that is manifestly impossible. Even if it were 100 feet long it would be manifestly impossible.

Mr. HEIDELBERG.—That is exactly what I am getting at, your Honor. I want to find out from this witness—

The COURT.—There is no evidence whatever that the bridle end of the hawser snapped clear back to the deck of the "Three Sisters," and it is perfectly evident that no such thing could possibly have happened. It might have if it were 50 feet, but certainly not at 100 feet.

Mr. HEIDELBERG.—That is exactly what I am getting at, your Honor, and I will be very frank in saying that we don't know what part of the apparatus struck these men. We do not know, and it appears in evidence, that they were struck by the rope —we presume by the rope, because if they had been struck by the swivel or by the bridle they certainly would have been killed outright. That is the only reason why they were not struck by that. [322]

The COURT.—Then, isn't it perfectly clear that it did not snap back and strike them with that part of the rope?

Mr. HEIDELBERG.—It is perfectly clear in my mind that it did not snap back.

The COURT.—It is perfectly clear to my mind that when the rope broke it was that part of the rope that was on the "Three Sisters" that struck these men.

Mr. HEIDELBERG.—That would be impossible.

The COURT.—Why?

Mr. HEIDELBERG.—Our testimony will show, if it has not shown already, that the rope did whip across in a doubled-up form.

The COURT.—Of course it whipped across, but your question assumes that it was the end of the rope which whipped across.

Mr. HEIDELBERG.—The end of the rope was made fast to the mast at all times.

The COURT.—I don't mean that end, I mean the other end. Perhaps I do not understand your question correctly, but if I do it assumes that the remains of the bridle, which would consist of the steel swivel and some couple of yards of rope on one side and 20 or 25 feet on the other swung back on to the deck of the boat; is that what you mean?

Mr. HEIDELBERG.—Or that the rope doubled back in between that and swung back.

The COURT.—I have no doubt of that. Some part of it struck these men. It could not have been anything except that part of the rope which was either between the mast and the stern rail, or immediately contiguous to it; it could not have been very much further than that from it.

(Testimony of Ernest Mohr.)

Mr. HEIDELBERG.—That is exactly what we are contending, your Honor, and our experts will show that if that captain had [323] out any length of rope at all, it would not have happened.

Mr. LILLICK.—We will be perfectly satisfied, your Honor, to have the testimony of such experts go in the record uncontradicted, because it would be a physical impossibility for anything else to have happened.

The COURT.—I think so. However, you have your theory of it, and I don't want to shut you off on your theory. Will you read the question, Mr. Reporter. (Question read by the reporter.) I cannot see that the question is intelligible, because if you mean by double back, or snap back—or, rather, do you mean by doubled back or snapped back that the end of the rope which was attached to the barge doubled back so that that came on board the "Three Sisters": Is that what you mean?

Mr. HEIDELBERG.—Will your Honor let me proceed with the captain for just a minute or two, and perhaps I can clear it up?

The COURT.—Yes, perhaps so.

Mr. HEIDELBERG.—And I will go back to that in a minute.

Q. Captain, you have been on tows where the hawser broke, haven't you? A. Yes.

Q. And that hawser snapped back some little distance, didn't it?

A. Yes, it recoiled—if that is what you mean.

Q. Yes, it recoiled.

(Testimony of Ernest Mohr.)

A. Not the end that was on the tow, but the part that is made fast to the tow bitt or mast, that part between the tow bitt and the stern of the boat recoiled back two or three feet, perhaps. I have seen that, if that is what you mean.

Q. And the longer your rope, and the more that the bight was in the water, the less the recoil would be of that rope?

A. I think the more the recoil would be.

Q. If the bight of the rope was in the water?

A. Because I [324] have never seen—

Q. Answer the question "Yes" or "No." Do you still say the recoil of the rope would be greater if the bight of the rope was in the water than it would be if it were clear up above the waves?

Mr. LILLICK.—Just a moment. The witness, in a perfectly frank way, was proceeding to explain his answer when counsel interrupted him. I think that the witness should be permitted to proceed.

The COURT.—But Mr. Heidelberg's objection was that he should answer the question first. Just answer that question "Yes" or "No," and then you may explain in any way you desire.

A. Yes.

Mr. HEIDELBERG.—Q. You understand, of course, that that question supposes that the bight of the hawser is in the water at the time of the break; I still ask you if, under those conditions, the recoil would be greater than it would be if at the time of the break the rope was entirely clear of the water?

(Testimony of Ernest Mohr.)

A. Well, I don't know. I have not seen it. The only time I have seen one of my hawsers break, as a rule, as much as I noticed of it, it was out of the water. There is such a strain on it that it straightens the full length of the hawser out straight.

Q. The fact is that there is a greater strain on a rope when it is outside of the water than when the bight is in the water?

The COURT.—Do you think it is necessary to instruct me on the ordinary laws of physics and mechanics? The function of an expert in admiralty cases is to instruct the Court. I think you can certainly rely on the Court for knowing the ordinary laws of physics. As a matter of fact, the extent to [325] which the rope will snap back will depend upon the strain on it, it would not make any difference whether it was in the water or out of the water.

Mr. HEIDELBERG.—I was just going to say that I was a little at sea myself on this. I have a threefold aspect in asking this, may it please your Honor. In the first place, it is to test how much of an expert the witness is; and then to show that the rope broke while it was outside of the water. If it was outside of the water there was a greater strain on it than there would have been if the boat had been in the water, and there would have been a greater strain on a short line than on a long line.

The COURT.—That is a different question. You may proceed.

Mr. HEIDELBERG.—Q. Is it not a fact, Cap-

(Testimony of Ernest Mohr.)

tain, that when you tow, you endeavor to have that length of line out which will keep as much strain off the rope as possible? A. Yes.

Q. And it is true that the longer the rope the greater stretching power that rope has?

A. Yes. It all depends on the size of your tugboat and the size of your tow. That has to be considered in it.

Q. Take this situation: Barge 61, towed with a 7-inch manila hawser by the "Three Sisters"; it is still the fact that if he had 600 feet of rope out there would have been less strain than there would have been if he had 150 feet of rope out: Isn't that true?

A. Yes, that is true.

Q. And the same thing goes for 350 feet of rope?

A. I think 350 feet of rope or 400 feet, in my opinion, is sufficient for a 130 horse-power boat and a light barge.

Q. But the question still remains unanswered, Captain, and [326] that is that 600 feet of rope under exactly the same conditions would have had a greater pulling power than 400 feet of rope?

A. I really don't know whether it would have had any more pulling power, because the launch is only able to tow so much, whether she has 1,000 feet of line out or whether she has 100 feet, or 50 feet.

Q. I don't mean pulling power, I mean pulling power of the rope, I don't mean the pulling power of the boat.

Mr. LINGENFELTER.—Do you mean tensile strength?

(Testimony of Ernest Mohr.)

Mr. HEIDELBERG.—Well, I suppose tensile strength might be it, but that would only apply to some little distance of rope.

Q. I mean the pulling power of the rope would be greater, the towing strength of the rope would be greater if there were 600 feet of rope out instead of only 400 feet of rope out.

A. That all depends under what conditions the tow is made.

Q. Under these conditions you have been told about.

A. Under those conditions I think it is sufficient to have that length of hawser between the barge and the launch.

Q. The fact remains that if he had 600 feet of rope out, he would have had a stronger rope out for that pull than if he had only 400 feet; there would have been less likelihood of its breaking: Isn't that true?

The COURT.—You have two questions there. Does your question mean there would be less likelihood of breaking, or that the rope would be stronger? You are asking him both ways. The distinction is very obvious. The length of rope has nothing to do with tensile strength, whatever. The safety of the tow has a good deal to do with it.

Mr. HEIDELBERG.—I withdraw the question, and will reframe it.

Q. There would have been less strain on the rope under these [327] conditions if he had had 600

(Testimony of Ernest Mohr.)

feet of rope out than if he had 400 feet of rope out: Is not that true?

A. There would have been less strain, you mean, according to the swell, according to the ground swell?

Q. Yes.

A. That I don't know, because I didn't see the ground swell, and you couldn't tell me how much of a ground swell there is, or how high, or how low; I could not very well say anything if I didn't see it.

The COURT.—Q. Is that a matter of judgment in the towing, as to the required length of the line, judging of the instant swells?

A. I think so. If I start out with a tow and I have, say, 600 or 700 feet of line, if I was towing to Point Reyes and I seen that the weather conditions were such that I could use the full length, or if it was nice weather that I could only put out perhaps 200 or 300 feet, it would be that much better towing for me.

Mr. HEIDELBERG.—Q. Do you mean you would graduate your line according to the swells you were encountering? A. Yes.

Q. And as those swells increased in length, you would then increase your line?

A. Yes, as much as I would.

Q. Towing in perfectly smooth sea, you could tow with a less length of line out than you could if the swells were long ground swells? A. Yes.

Q. That is what you mean. You also, when you

(Testimony of Ernest Mohr.)

are towing, if any men were sitting at the stern of the boat, as your passengers, you would order them to leave, would you not? A. Yes.

Q. And you are the master of the ship when you are the captain, aren't you? A. Yes.

Q. And you would compel those men to leave, would you not?

A. It is your duty to warn the men. [328]

Q. And you would take the precaution of knowing that they heard your warning, wouldn't you?

A. I would ask them; it is customary to have the men repeat an order you give them. As a rule it is customary to have the men repeat what you tell them.

Q. I am speaking only of passengers. I don't want to confuse you. If you had some passengers who were on the stern of the boat, and you were towing a vessel, you would tell those men in such a way that you would know that they understood you to get away from there, would you not? A. Yes.

Mr. LINGENFELTER.—Just a moment, Mr. Heidelberg; what do you mean by passengers?

Mr. HEIDELBERG.—Not members of the crew, not your employees, or the employees of the master in any way.

Q. If you had such a passenger on board who was not a member of your crew, and was not working on the ship in any way, you would tell him to get away from the stern of the boat, wouldn't you?

A. Yes, I would tell them, no matter whether they were a part of the crew, or not.

(Testimony of Ernest Mohr.)

Q. It is a fact, is it not, that in towing they use towing machines almost exclusively now?

A. On steamers they use towing machines, yes.

Q. And that is for the purpose of taking up the slack in the line, isn't it?

A. Yes. There are two ways of looking at that. The first point of it is that a towing machine is naturally cheaper, in the long run, than would be a straight manila hawser.

Q. And when you have not got a towing machine on board, you know, as a captain, that it is necessary, sometimes, with long ground swells, to slow up your engine and then to start it ahead again and keep the tow and the weight equal distances apart, do you not, as much as possible, and in order [329] to do that it is necessary to manipulate the engine, is it not?

A. To some extent it is, yes; if there is a heavy swell and you take too much of a line on your tow, you slow down, as a rule.

Q. And you keep a constant watch on your tow, do you not? A. Yes.

Q. And you graduate the speed of your engine to suit the towing condition?

A. Whatever conditions you are under, yes.

Q. That is what I am getting at. You do keep a constant eye on your tow? A. Yes.

Q. And you change the speed of your engine according to the way the tow is being made?

A. And the condition you are under, yes.

The COURT.—Q. What is a towing machine?

(Testimony of Ernest Mohr.)

A. A towing machine is an automatic gear; it can be set for a heavy sea; when there is an extra heavy strain on the hawser it pays out, and then the strain is over it takes that back again.

Q. You have a capstan with a collar on it: Is that the arrangement?

A. Yes, it is a big drum with an automatic gear.

Mr. LILLICK.—Q. And that is only used on heavy tows, isn't it?

A. It is used on the steam tugs. And, of course, steam is required to operate the towing machine.

Q. You never heard of a barge being towed with a towing machine, have you?

A. Yes, I have towed barges with a towing machine.

Q. Inside? A. Inside, and also outside.

The COURT.—Q. Do they have towing machines on tugs?

A. On steam tugs, yes; we have none on our launches.

Mr. HEIDELBERG.—No further questions.

Redirect Examination.

Mr. LINGENFELTER.—Q. Captain, in your experience, have you seen many swivels of the type of Exhibit "A"? A. Yes. [330]

Q. I call your attention to the construction of this swivel. There appears to be a rivet with two bearing surfaces; it would be necessary for both of those to freeze before the swivel would cease to function, would it not, both bearing surfaces?

(Testimony of Ernest Mohr.)

A. Not necessarily. If part of this swivel would freeze the other part would still be free.

Q. And the swivel would still turn? A. Yes.

Q. So it would be necessary for both of them to freeze before it would incapacitate the swivel, would it not? A. Yes.

Q. Did you ever see both of them frozen in your life?

Mr. HEIDELBERG.—I object to that as immaterial. The question here is what was the condition of this swivel.

The COURT.—I will sustain the objection to that.

Mr. LILLICK.—Q. Is there any difference in the length of the tow-line required by a tug of heavy horsepower and one of a lighter horsepower?

A. Yes.

Q. Will you explain that?

A. You take the average length of the Crowley launch tow-lines, they run lines out 250 feet, or 300, or 350 feet, whereas on a steam tug it is required to have the full length of hawser out, the full length meaning 125 fathoms.

Q. In your answer to the hypothetical question, did you take into account that the horsepower of the "Three Sisters" was 135? A. Yes.

The COURT.—Q. Why is that, Captain?

A. Tugboats, referring to steam tugs, are towing, nine times out of ten, heavy ships.

Q. Then it is by reason of the weight of the tow?

A. Yes, the weight of the tow.

(Testimony of Ernest Mohr.)

Mr. HEIDELBERG.—Q. When you said that the average length [331] of line used by Crowley was 250 feet, you had in mind, of course, that Crowley's towing is inside towing, didn't you?

A. What I mean by that is, the line I used, myself, while working for Mr. Crowley in launch towing around the bay, and in whatever outside towing we had to do—the outside towing was not very much.

Q. When you worked for Crowley, did Willie Figari work for Crowley at that time? A. Yes.

Q. And if I told you that Willie Figari testified that they did very little outside towing, you would say that that is correct, wouldn't you? A. Yes.

The COURT.—That is just what he says now.

Mr. HEIDELBERG.—Q. As a matter of fact, do you remember ever towing any distance outside the heads for Mr. Crowley? A. Yes.

Q. How many times?

A. I don't exactly remember the number, but probably half a dozen times, speaking offhand.

Q. That would be just outside the heads, to unload rubbish barges? A. Yes.

Q. As a matter of fact, you don't know of one time that Crowley ever towed a barge as far as Point Reyes, do you?

A. We took a boiler off the beach at Bolinas.

Q. And that is the only time when the barge went up with a boiler, or got a boiler, that you remember Crowley going any distance outside the heads?

A. We towed rock barges for Duncanson and

(Testimony of Ernest Mohr.)

Harrison around Bolinas when they were building the electric towers for the Great Western Power Company.

Mr. LINGENFELTER.—Q. In towing those rock barges, Captain, did you use a bridle of the character that I have described in the hypothetical question?

A. Yes, something similar to that. [332]

Mr. HEIDELBERG.—Q. You say a bridle; you always use a bridle when you are towing a barge, do you not?

A. Not always. When the launches were equipped with bridles, we did, yes, but in the tugboats they do not as a rule carry any bridles with them when you tow barges for any distance, or for any length of time.

TESTIMONY OF FRED WOODS, FOR CLAIMANTS.

FRED WOODS, called for the answering claimants, sworn.

Mr. HEIDELBERG.—If your Honor please, I intend to make this examination just as short as I can.

Q. Mr. Woods, you were the cook working for Healy-Tibbitts under Mr. Carlsen's direction while the wharf was being built for Paladini, from approximately May 10 to June 8, 1923, were you not?

A. Yes.

Q. How long did you remain at Point Reyes while you were working there?

(Testimony of Fred Woods.)

A. I remained there most all the time we were there.

Q. That was about four weeks?

A. Longer than that.

Q. While you were there did you go and come back and forth to San Francisco?

A. I came once.

Q. And did you then stay up there the rest of the time? A. Yes.

Q. When you came back, what boat or vessel did you take to come back to San Francisco on?

A. We came in on the "Corona."

Q. When you came back to San Francisco the last time, on June 8, what vessel did you take?

A. The "Three Sisters"; that was when we came in with the barge.

Q. What vessel did you go up on the first time?

A. The "Three Sisters."

Q. Did you ask permission to come back to San Francisco on the "Three Sisters," on the last voyage? A. No, sir.

Q. Did you hear the captain say anything to you, or to anyone [333] else, about your occupying a particular position on the "Three Sisters"?

A. No, sir.

Q. Do you remember what you did after the "Three Sisters" got outside of the bell buoy, as to whether or not you played cards?

A. Shortly after we left the wharf, I made coffee and a light lunch for the boys, and it was quite a while before we reached the city.

(Testimony of Fred Woods.)

Q. What did you do in the meantime, what were you doing just prior to the accident?

A. Oh, we were just walking around the boat.

Q. Just prior to the accident. When the accident happened, what were you doing?

A. Playing cards.

Q. How close was the tow-line to you at any time while you were sitting there in the stern of the boat?

A. Oh, I don't know, I should say six or seven feet.

Q. How much?

A. About seven feet, probably.

Q. Did you notice the barge at any time while you were coming back to San Francisco?

A. I didn't pay very particular attention to it, because I was busy playing cards.

Q. While you were sitting back there playing cards, or just before that time, did the captain come back to the stern of the boat at any time?

A. I believe he came back there to clean a few trout for Mr. Carlsen during the time we were there.

Q. Did you see what it was that struck Mr. Carlsen and Mr. Sauder? A. No, sir.

Q. You just know they were sitting there and got struck? A. Yes, sir.

Mr. HEIDELBERG.—I think that is all. I think the rest, your Honor, would be cumulative. [334]

(Testimony of Fred Woods.)

Cross-examination.

Mr. LILLICK.—Q. Did you help them load the launch with the supplies?

A. I put the supplies down on the wharf, and the boys loaded them on to the boat.

Q. The boys did the loading on to the boat?

A. Yes.

Q. When you got on the "Three Sisters," where did you step down on her? A. I stepped down amidships.

Q. Was that aft of the house? A. Yes.

Q. What was there forward of the house, on the deck forward?

A. The stove was forward, and the steel cots.

Q. Where were the other things piled?

A. There was quite a lot of stuff piled on the port side; the port side was entirely blocked.

Q. Do you remember the man shaving in the galley? A. No, sir.

Q. While you were making coffee, wasn't there a man in there shaving?

A. I don't see how he could be, because there wasn't any room.

Mr. HEIDELBERG.—I object to that as not cross-examination, your Honor. I purposely limited my direct examination.

The COURT.—Yes. I will sustain the objection.

Mr. LILLICK.—No further cross-examination.

TESTIMONY OF EDWARD ROWE, FOR CLAIMANTS.

EDWARD ROWE, called for the answering claimants, sworn.

Mr. HEIDELBERG.—Q. Mr. Rowe, you remember of the pile-driving crew working for Healy-Tibbitts at Point Reyes building a pier, or wharf, for A. Paladini, Inc., from on or about May 10th to about June 8th, 1923, were you not?

A. Yes, sir.

Q. During the time that you were building this wharf, did you stay at Point Reyes all the time, or did you come back to San Francisco at week-ends? [335] A. Yes, Saturdays.

Q. You came back Saturdays. When would you go back to Point Reyes?

A. On Monday morning.

Q. What vessels would you travel back and forth on?

A. Well, the first time I went I went on the "Three Sisters." Well, I guess it was about a standoff while I was there.

Q. Do you mean on the "Corona" and on the "Three Sisters," that it was about a standoff?

A. Yes. I went on the "Three Sisters" first.

Q. And you came back on the "Three Sisters"?

A. Yes.

Q. Do you remember what boat it was you went up on to Point Reyes the week before the accident?

A. No, I don't just exactly remember.

(Testimony of Edward Rowe.)

Q. Do you remember anything happening at the wharf—just to refresh your recollection as to what boat it was—just before you started off on your journey the last time?

A. Yes, there was one day there something happened; it was not very much, though.

Q. It happened on the "Three Sisters," didn't it, so that you know that at one time you went up on the "Three Sisters"? A. Yes.

Q. When you started back, or at any time before your journey was commenced to San Francisco, or at any time on June 8th, did you ask the captain's permission to come down to San Francisco on the "Three Sisters"? A. No.

Q. At any time during that voyage, or while you were on the "Three Sisters," did the captain ever tell you, or tell anyone else in your presence, what part or portion of that vessel you were to occupy?

A. No, he didn't.

Q. Did you ever hear him warn you, or hear him warn anyone else about staying away from the towline? A. No, I didn't. [336]

Mr. HEIDELBERG.—That is all.

Mr. LILLICK.—That is all.

TESTIMONY OF HENRY S. HEIDELBERG, FOR CLAIMANTS.

HENRY S. HEIDELBERG, called for the answering claimants, sworn.

Mr. BELL.—Q. Mr. Heidelberg, you are attorney for Mr. Carlsen and Mr. Sauder in this case?

(Testimony of Henry S. Heidelberg.)

A. I am.

Q. Did you have at any time any conversation with Mr. Figari, which you remember?

A. Yes. I first met Mr. William Figari about three months ago, and then I met him again Monday a week ago. At both times I had conversations on the happening of this accident, and the securing of the bridle and equipment.

Q. What were those conversations?

A. The first time I saw Mr. Figari Mr. Carlsen was along with me, and—

Mr. LILLICK.—Will you pardon me, Mr. Heidelberg. What is the purpose of this examination, Mr. Bell? You are now calling for hearsay.

Mr. BELL.—The purpose is in respect to impeaching Mr. Figari's testimony, which was gone into at the time that he was on the stand. There were two conversations.

Mr. LILLICK.—Will you specify the particular point of impeachment?

Mr. BELL.—With respect to the telephone conversation of Mr. Brown, securing the barge for Paladini, and with respect, also, to what Mr. Figari said in respect to this bridle.

Mr. LILLICK.—Will you confine the statements to that?

Mr. BELL.—Q. Confine your statements accordingly, Mr. Heidelberg.

A. I had a conversation with Mr. Figari on Monday a week ago, at Crowley Launch & Tugboat Company's office; Mr. Carlsen was present; Mr.

(Testimony of Henry S. Heidelberg.)

Figari was present, and I [337] was present. Mr. Figari at that time told me that Martin Brown telephoned him and asked for a bridle. He said he told Mr. Brown that he didn't have any bridle. Brown said to him, "You will have to get us one." So Willie Figari said, "I got him a bridle, I saw one on a boat and I told the captain to put it upon the wharf, I don't know how it got down to Pier 46." He says he thought Mr. Brown came and got it himself. I asked Mr. Figari if he knew for what purpose this bridle was to be used, and he said he did not, that they didn't tell him. That is all the conversation I had with him.

Mr. BELL.—That is all.

Mr. LILLICK.—No cross-examination.

TESTIMONY OF ALEXANDER PALADINI, FOR CLAIMANTS (RECALLED).

ALEXANDER PALADINI, recalled for answering claimants.

Mr. HEIDELBERG.—Q. Mr. Paladini, you were visited by Joseph J. McShane, were you not, about five or six weeks after the happening of this accident? A. No, sir.

Q. When do you say it was you first received a visit from Joseph McShane, an attorney-at-law, after this accident?

A. I met Mr. McShane about three months after the accident, down in my market; he came down to the market and wanted to get some fish, and

(Testimony of Alexander Paladini.)

while he was getting some fish he asked me about some insurance on the boats, about some men that were hurt on the "Three Sisters." I then took him upstairs to my secretary, Mr. Chicca, and introduced him to my secretary, and I left him there.

Q. Didn't you tell me out in the hall, here, the other day, that you did have a conversation with Mr. McShane about five or six weeks after the happening of this accident, and that [338] he asked you at that time what you were going to do for these men, and that you told him that it was an accident, and that you would do nothing for them, but you would help them with any insurance if you could? A. I did not.

Q. Didn't you have that conversation with me outside in the hall, here? A. No, sir.

Q. What conversation did you have with me relating to that: Just give the substance of it? What did you say to me?

A. The conversation we have had since I met you, you said, "Good morning, Mr. Paladini," and I, in return, said, "Good morning," to you. We didn't say anything. If it was anything, it was only in a casual way. It was nothing about the case, at all. I said nothing to you about this case.

Q. Didn't you talk to me about Mr. Joseph McShane coming down to your place?

A. You confine yourself to the time, and then I will say "Yes" or "No." You say five or six weeks, and I say no.

(Testimony of Alexander Paladini.)

Q. It was last Wednesday when you had the conversation with me.

A. No, you are wrong when you say that Mr. McShane came down to see me five or six weeks afterwards, because he did not.

Q. Didn't you have a conversation with me out in the hall of this building last Wednesday, in which you told me that it is true Mr. McShane did come down and see me about six weeks afterwards and asked me what I was going to do for these men, and that I told him it was an accident, and that I didn't feel like I should do anything, but that I would help them out with the insurance company to get the compensation?

A. You are wrong, Mr. Heidelberg, when you say five or six weeks.

Q. Mr. Paladini, you had a contract, did you not, with the Crowley Company, by which you secured this barge and its equipment? [339]

Mr. LINGENFELDER.—Mr. Heidelberg, I will state the facts regarding that. Mr. Heidelberg telephoned me, your Honor, and demanded the charter of the barge, and to know whatever insurance we had upon it. I searched Mr. Paladini's files but could not find the charter-party. I then went to Mr. Crowley's office, and we found a charter-party between the Paladini Company, the signature to which, on behalf of the Paladini Company, was by Alexander Paladini, now on the witness-stand, and the Crowley Company, calling for a rental of $10 a day, payable to the

(Testimony of Alexander Paladini.)

owner, and providing for insurance in the amount of $6,000 in favor of the owner. Paladini & Co., after entering into this charter-party, insured the barge for $8,000.

Mr. HEIDELBERG.—That statement will be accepted as evidence. That is all.

Cross-examination.

Mr. LILLICK.—Q. Will you recite your recollection of the conversation you had with Mr. Heidelberg, in the hall, last Wednesday, what he said to you and what you said to him, as nearly as you can remember it?

A. I don't remember any conversation at all; I remember speaking to Mr. Heidelberg. All I remember is saying "Good morning," and a few little things like that. It didn't amount to anything. Regarding his telling me about five or six weeks, Mr. McShane came down to my place, but the five or six weeks is entirely wrong. He did come down in about three months. What I mentioned a while ago is all I heard. Then I went back east and did not return for 2½ or 3 months. When I came back my secretary, Mr. Chicca, told me we were served with papers by Mr. Heidelberg and Mr. McShane. That is all I know about it.

Q. Then coming back to the conversation that you had with Mr. McShane after the accident, whenever it was, whether it was [340] five or six weeks afterwards or whether it was three months afterwards, did Mr. McShane, at that con-

(Testimony of Alexander Paladini.)

versation, say anything to you about the men making claim against Paladini, Inc.?

A. No, not at that time.

Q. When did you first hear that the men were going to make a claim against Paladini, Inc.?

A. Well, the first I knew about was when I returned from the east.

Q. And can you fix approximately how long after June 8, 1923, that was?

A. I returned from the east in the latter part of November. When I came back from the east in the latter part of November my secretary told me we were served with papers regarding these two men that were hurt on our boat.

Q. And that was the first time you had heard that they were making claim against Paladini?

A. Yes.

Mr. HEIDELBERG.—We now offer in evidence the deposition, taken by stipulation, of John True Urquhart, another member of this crew. I would ask permission to read it. It is short, and it is very enlightening. Before reading it, I want to put Mr. Carlsen on the stand for the purpose of showing that Mr. Urquhart worked for about 20 years for Haviside, in this city and county, during which time his business was the manufacture and making of bridles and equipment such as these. You don't know that to be the fact, do you, gentlemen?

Mr. LILLICK.—No, I do not.

Mr. HEIDELBERG.—Then I will call Mr. Carlsen.

TESTIMONY OF WILLIAM CARLSEN, FOR CLAIMANTS (RECALLED).

WILLIAM CARLSEN, recalled for answering claimants.

Mr. HEIDELBERG.—Q. Do you know True Urquhart?

A. Yes, I have known him for the last twenty years, or so. [341]

Q. Do you know what his previous employment was in the city and county of San Francisco, prior to the time he started working for you?

A. I have known him as a rigger all the time. It is only here recently that he started in pile-driving. I have known him to be superintendent for Smith, Rice, and I have known him to be superintendent for Mr. Haviside.

Q. What is Haviside & Co.? A. Ship riggers.

Q. And they have equipment—bridles, and shackles and rope, and they deal in those things, don't they?

A. They make them for their own use, and also for ships; they make rigging.

Mr. HEIDELBERG.—That is all.

Mr. LILLICK.—No questions.

Mr. HEIDELBERG.—I will now read the deposition of John True Urquhart. (Reads.)

The COURT.—We will suspend now until two o'clock.

(A recess was taken here until two o'clock P. M.) [342]

AFTERNOON SESSION.

TESTIMONY OF JOSEPH J. McSHANE, FOR CLAIMANTS.

JOSEPH J. McSHANE, called for the answering claimants, sworn.

Mr. HEIDELBERG.—Q. Mr. McShane, you are an attorney at law? A. Yes.

Q. And you are acquainted with Mr. Carlsen and Mr. Sauder, claimants in this case?

A. Yes.

Q. When was the first time that you saw Mr. Carlsen?

A. I saw Mr. Carlsen for the first time at a visit that he made to my office about a week after he left the hospital.

Q. Bearing in mind the date of June 8, 1923, how long would you say it was after that time that you first saw Mr. Carlsen?

A. That I could not tell you, to be certain about, but I know that he told me he had been out of the hospital about a week at that time.

Q. And at that time did you see Mr. Sauder?

A. No.

Q. Where was Mr. Sauder, if you know?

A. I don't know, other than what I was informed by Mr. Carlsen.

Q. Did you see Mrs. Sauder at that time?

A. I saw Mrs. Sauder at about that time, yes.

Q. And at that time you had not seen Mr. Sauder at all? A. No.

(Testimony of Joseph J. McShane.)

Q. You later on saw him after *you* came out of the hospital, didn't you?

A. After he came out of the hospital I did, yes.

Q. Did you ever meet Mr. Alec Paladini in connection with this case? A. Yes.

Q. How long was it that you saw Mr. Alec Paladini for the first time after this accident?

A. Well, I saw him about a week after the visit of Mr. Carlson to my office, during the week, I would say.

Q. What would you say as to how long after the accident that [343] was: Was it five weeks, was it six weeks, seven weeks, or eight weeks, or when was it?

A. I have forgotten now just how long Mr. Carlsen was in the hospital, but it was during the week after the visit of Mr. Carlson to my place. Mrs. Sauder came to my office on his second visit.

Q. And then after Mr. Carlsen had been there, how long was it after you saw Mr. Carlsen for the first time that you saw Mr. Paladini?

A. It was perhaps three or four days. It was a week at the most. I attended to the matter right away.

Q. Did you have a conversation with Mr. Paladini in relation to this accident? A. Yes, I did.

Q. Whereabouts? A. In his office.

Q. Just what was the conversation, the substance of it?

A. It was late in the afternoon that I was there. I spoke to Alec downstairs, and we went upstairs

(Testimony of Joseph J. McShane.)

to Mr. Chicca's office, looking at various ships, and he pointed out the pictures of the ships on the wall. I told Alec downstairs that I had come down to see him in reference to this accident, and wanted to know what it was his intention to do with reference to taking care of these men. That was the sole purpose of the visit at that time.

Q. And you know that was within the week after you first saw Mr. Carlsen? A. Oh, yes.

Cross-examination.

Mr. LILLICK.—Q. Refreshing your recollection about that, is it not true that in your talk with Mr. Paladini you came down and told him that you were going to try to get what you could for the men on their compensation, and that at this conversation with Mr. Paladini and with Mr. Chicca no word was said about your commencing suit against Paladini, Inc.?

A. No, I [344] didn't tell him I was going to commence suit. I did not mention anything about compensation, though, that I know of. I merely went down there and asked Mr. Paladini what was he going to do with reference to these men.

Q. What did Mr. Paladini say?

A. Well, he said that as far as he was concerned, he was very sorry for the occurrence, that it was an accident. I believe that he and Mr. Chicca and I then drifted on on to some sort of a social conversation, and got away from this subject.

Q. You are a friend of Mr. Paladini's?

(Testimony of Joseph J. McShane.)

A. For a good many years I have known Mr. Paladini.

Q. Are you sure that nothing was said in that conversation about obtaining workmen's compensation, about obtaining workmen's compensation for the men?

A. No. I knew nothing concerning Mr. Paladini's situation about compensation. The compensation, if there was any, was an afterthought.

Q. Would you go so far as to say that nothing was said at that conversation about workmen's compensation?

A. Yes, I would say that, because the thought that was in my mind at that time about compensation was—

Q. Well, pardon me, we are not concerned with what was in your mind.

Mr. HEIDELBERG.—I think that he should be allowed to finish his answer, your Honor.

Mr. LILLICK.—No, I think not. I asked him only for what was said.

The COURT.—Yes, just what was said.

Mr. LILLICK.—That is all. [345]

TESTIMONY OF WILLIAM CARLSEN, FOR CLAIMANTS (RECALLED).

WILLIAM CARLSEN, recalled for answering claimants.

Mr. HEIDELBERG.—Q. Mr. Carlsen, where were you struck by this rope, if you were struck by the rope?

(Testimony of William Carlsen.)

A. Well, I don't know. I was black from here down, and all around here, and my jaw was hanging down here, and on the back of my head. I don't know where I was struck. All this neck cord was torn loose from my skull. I don't remember anything hitting me at all, I don't know what struck me.

Q. You were sitting at that time, so you have been informed, with your back to the stern of the boat?

A. I know that is the way I sat myself back there.

Q. And you know that the vertebra in your neck was dislocated? A. Yes.

Q. And you were forced to wear a collar for some time on account of the neck injuries, weren't you?

Mr. LILLICK.—That is objected to as leading. Of course, I don't like to make any unnecessary objections.

Mr. HEIDELBERG.—Q. What appliance did you wear on the back of your neck after the injury?

Mr. LINGENFELTER.—We object to this line of inquiry. This is a matter for the Commissioner, as to the extent of the loss.

The COURT.—Well, it won't do any harm, and it might throw some light on the way the accident occurred.

A. The doctor sent me over here to Hittenberger's, and he made a plaster-of-Paris cast around

(Testimony of William Carlsen.)

my neck to get the model for a leather collar reinforced with German silver, and I had to wear that.

The COURT.—Q. How was the other man hurt, what was the nature of his injury?

A. Fractured skull, I believe, and a blood clot on the brain. [346]

Mr. HEIDELBERG.—Q. When did you leave the hospital? How long were you in the hospital?

A. I was not in the hospital very long; I was only in the hospital a week or ten days, I don't just remember.

Q. How long after the accident was it that you saw Mr. McShane for the first time?

A. At the very extreme it would not be over five weeks, at the very latest.

Mr. HEIDELBERG.—That is all.

Mr. LILLICK.—No questions.

TESTIMONY OF JOHN SAUDER, FOR CLAIMANTS.

JOHN SAUDER, called for answering claimants, sworn.

Mr. HEIDELBERG.—Q. Mr. Sauder, you are one of the answering claimants in this case, are you not? A. I am.

Q. You were employed by Healy-Tibbitts at Point Reyes during the month of May and up until June 8, 1923, in building a pier or wharf for A. Paladini, were you not?

A. I believe I was, from hearsay; I have no knowledge of it.

(Testimony of John Sauder.)

Q. You do remember, do you not, Mr. Sauder, that you went over to Point Reyes and came back sometime during that time, do you? A. I do.

Q. Do you remember when you first went over to Point Reyes? A. I do.

Q. What vessel did you go on at that time?

A. On the "Corona."

Q. Do you remember going over at any time, or of coming back?

A. I remember coming back on the "Corona" once, I believe.

Q. Do you remember ever being transported back and forth on the "Three Sisters"?

A. I only have a slight recollection of being on the "Three Sisters," coming back one trip.

Q. Just before you went over for the last time, do you remember [347] any occurrence that took place on the dock between the captain of the "Three Sisters" and one of his crew?

A. I remember a wrangle on the bulkhead that morning.

The COURT.—What morning was that?

A. I believe that was the Monday morning before the accident.

Q. When you were going up?

A. On the way going up.

Q. And you mean by "the bulkhead," the bulkhead here in San Francisco?

A. The bulkhead here in San Francisco.

Q. After that you don't remember a thing, do you?

A. No, sir.

(Testimony of John Sauder.)

Q. You don't remember working there all week, do you? A. No, sir.

Q. Do you remember coming back on the "Three Sisters" at all on this occasion? A. I do not.

Q. Do you remember getting on the "Three Sisters"? A. I do not.

Q. You don't remember the accident at all, do you? A. No, sir.

Q. When is the next thing that you remember?

A. I remember waking up and not knowing where I was, or who I was, or anything else.

Q. Where were you at that time?

A. I was in a private ward in the St. Francis Hospital.

Q. And that was some ten days afterwards, was it?

A. I would say it was 15 or 16 days afterwards.

Mr. HEIDELBERG.—That is all.

Mr. LILLICK.—No questions.

Mr. HEIDELBERG.—We have a copy of the charter-party here, and I would like to offer it in evidence. I call the Court's particular attention to the third paragraph thereof.

The COURT.—What is the third paragraph?

Mr. HEIDELBERG.—It reads as follows: [348]

> "It is further mutually agreed that while the barge is under hire to the charterer as aforesaid, the owner shall be under no personal liability for damage caused by such barge or any other causes to any cargo or goods, or any other vessel or vessels, or the cargo thereof, or people thereon, or the crew of said barge, or men em-

ployed on board said barge, or to persons or property on shore; and the charterer hereby assumes all of such risks, and hereby undertakes and agrees to hold said barge and her owner harmless from all such claims, and the costs, expenses and attorneys' fees on litigating the same, and all other claims of any kind or character, whether like or unlike these enumerated, which shall arise from the use of said barge by the charterer, or from any act done on board or in loading, repairing, or serving her."

It is signed by Alex. Paladini, as president, on behalf of A. Paladini, Inc., and by Robert W. Greene, on behalf of the Crowley Launch & Tugboat Company.

Mr. LILLICK.—If counsel is offering the charter for any purpose other than the paragraph just read, that is entirely immaterial. It is not relevant to any of the issues in this case, and would be in evidence of contractual liability, if any, to the Crowley Launch & Tugboat Co.

Mr. HEIDELBERG.—We offer it for all purposes, to show who was the charterer of the barge.

The COURT.—I will let it in.

(The document was here marked Claimant's Exhibit "B.")

Mr. BELL.—I wish to call to the Court's attention, since the Court has personally inspected the vessel, the diagram or chart of her which has been offered in evidence here, and which [349] does not seem to me to accord with the vessel as she appeared on a personal examination. I would like to ask

counsel whether or not the diagram here is an accurate diagram drawn to the exact scale of the vessel?

Mr. LINGENFELTER.—I believe, in view of the ship's articles, Mr. Bell, that that diagram is slightly inaccurate. However, for rough purposes, I believe it is sufficient.

The COURT.—How was the diagram made—was it made by actual measurements?

Mr. LINGENFELTER.—The diagram was made from a map which we secured from Cryer, the original builder of the "Three Sisters." I think the scale was taken from that. We did not have the ship's articles before us at that time. There is some discrepancy here as to the size of the vessel as shown by that map and the ship's articles.

The COURT.—Probably you took a planimeter and measured the distance on the original drawings.

Mr. LINGENFELTER.—I think that is very likely the way it is done, your Honor.

The COURT.—Then it might have occurred in that way; it might have occurred on account of the shrinkage of the paper.

Mr. BELL.—I simply wish to have it appear that the vessel, itself, in various respects, differs from this diagram.

The COURT.—Do you mean as to size?

Mr. BELL.—As to size. Also I call your Honor's attention to the fact that there was no flagpole in the stern of the vessel. Also, that the house, here, is not an accurate representation of the house. Your Honor will remember that the pilot-house was slightly above the galley. I think the dimensions of

the vessel here do not accord with the dimensions of the [350] vessel actually.

The COURT.—Well, we have the registry here. What difference does it make?

Mr. LINGENFELTER.—I want to say to your Honor, in justification of our producing this particular diagram, that the evidence taken before the Commissioner at the time the valuation was fixed in this proceeding, showed that there had been a new house constructed. As I think about it now, very likely this diagram, being taken from the original diagram of the builder, had the original house upon it, and not the house which was later put on.

The COURT.—I understand it, anyway.

Mr. BELL.—I wish also to renew my demand upon counsel for the certificate of inspection of the "Three Sisters" by the local inspectors, particularly their certificate of inspection of her with respect to the carriage of passengers by her, as to the number of passengers, if any.

Mr. LILLICK.—Counsel, I think, must know that we have no such certificate. The vessel was not a passenger-carrying vessel.

Mr. HEIDELBERG.—We rest.

The COURT.—The Clerk calls my attention to the fact that that diagram has never been offered in evidence.

Mr. LILLICK.—Thank you very much for suggesting it, Mr. Clerk. We will offer it in evidence. I think it will be of very little aid, other than refreshing the Court's recollection as to just what the situation was.

The COURT.—It is of some use.

Mr. LILLICK.—We offer it in evidence as our next exhibit.

(The diagram was here marked Petitioner's Exhibit 4.)

We rest, your Honor. That is our case. [351]

(Thereupon, by stipulation of counsel, the cause was submitted on briefs to be filed in 5, 5, and 5.) [352]

PETITIONER'S EXHIBIT No. 1.

W. H. HEALY, President. CHARLES C. HORTON, Vice-President. JOHN H. EDWARDS, Secty. & Treas.

HEALY-TIBBITS CONSTRUCTION CO.
Incorporated.
Builders and Contractors.
64 Pine Street,
San Francisco, Cal.

April 25, 1923.

Fireproofing & concrete construction excavating, pile-driving and concrete foundations, grading and steam shovel work.

Wharves, bridges and warehouses, teaming, general contracting.

Mr. A. Paladini, Inc.,
Washington Market,
San Francisco, Calif.

Dear Sir:

Referring to the construction of wharf for you at Pt. Reyes, we propose to complete the structure according to the blue-print which we are enclosing you with this letter for the sum of $5950.00.

This bid is based on using untreated piles for the first 120 ft. of the trestle from the shore line out and creosoted piles for the balance of the work.

The lumber which we propose to furnish will be good sound used lumber. We have figured upon delivering all materials and equipment necessary to complete the work to you in San Francisco; you to freight same to P. Reyes and deliver it to our men at the site of the wharf; the piles and timbers for caps to be cast over-board; the planking and stringers to be made up in rafts so as to land same ashore. The engine can be taken ashore on top of a raft of timber or on a small barge if you will have one available at the work. The balance of the material such as bolts, spikes, wire rope and tools can be landed ashore [353] from a raft. We do not think it would be safe or advisable to attempt to tow any of the piles from San Francisco to Pt. Reyes. It is our opinion that these piles will have to be carried on one of your boats and that several trips will be necessary as there are 96 piles in the structure.

When the work is finished, we have figured that you are to transport our equipment back to San Francisco, and that all of this transportation both to Pt. Reyes and return to San Francisco when the work is finished, is to be done at your expense and without cost to us.

We have also based our price upon the understanding that there is water available for use in our boiler for driving piles. If sufficient water cannot be had, it will be necessary to bring in water for this purpose which we have not included in our price and of course you will have to do this at your

own expense. Our consumption is approximately 1000 gallons every day we are working.

We have figured that our men will have to sleep in tents close to the work, and that we will have to arrange for them to prepare their own meals. This expense we will take care of ourselves with the understanding that you will deliver supplies to them three times a week which we will furnish you in San Francisco.

Hoping to receive your favorable consideration, we are

HEALY-TIBBITTS CONSTRUCTION CO.
CHARLES C. HORTON.

CCH-L.
Enc. [354]

ARTICLES OF AGREEMENT.

Made this —— day of May one thousand nine hundred and twenty-three BETWEEN A. Paladini, Inc., hereinafter called the Owner, and Healy-Tibbitts Construction Company, hereinafter called the Contractor,

WITNESSETH: The words Owner, Contractor and Superintendent used herein in the singular shall include the plural, and the masculine the feminine.

FIRST. The Contractor agrees, within the space of sixty working days from and after the date of this agreement to furnish the necessary labor and materials, including tools, implements and appliances, required, and perform and complete in a workmanlike manner, free from any and all liens

and claims of artisans, materialmen, sub-contractors and laborers thereon, a wharf having a total length of two hundred and forty feet; 120 ft. of which is to be 10 ft. wide; 110 feet 30 feet wide and the outer end 50 feet wide; all in accordance with blue-print entitled "Pier & Approach at Point Reyes, California, for A. Paladini Co.," which has been signed by both parties to this agreement and made a part hereof, and described in and by, and in conformity with the written proposal of said Healy-Tibbits Construction Company addressed to A. Paladini Company, dated April 25, 1923, which is hereby incorporated into and made part of this agreement.

SECOND. Said Architect shall provide and furnish to the Contractor all details and working drawings necessary to properly delineate said plans and specifications; and the work is to be done and the materials furnished in accordance therewith under the direction and supervision and subject to [355] the approval of said Architect, or a Superintendent selected and agreed upon by the parties hereto, within a fair and equitable construction of the true intent and meaning of said plans and specifications.

THIRD. A reasonable allowance for the time during which the Contractor is delayed in said work by the acts or neglects of the Owner or his employees, or those under him by contract or otherwise, or by the acts of God which the Contractor could not have reasonably foreseen and provided for, or by stormy and inclement weather which delays the work, or by any strikes, boycotts, or like

obstructive action by employee or labor organizations, or by any general lock-outs or other defensive action by employers, whether general, or by organizations of employers, shall be added to the aforesaid time for completion.

(Form A.)

FOURTH. Said wharf is to be erected to the satisfaction of J. Del Favero, superintendent for said A. Paladini, Inc.

FIFTH. The Owner agrees, in consideration of the performance of this agreement by the Contractor, to pay, or cause to be paid, to the Contractor, his legal representatives or assigns, the sum of Five thousand nine hundred and fifty dollars (5950.00) dollars in United States Gold Coin, at times and in the manner following, to wit:

On the 5th day of Each month the Contractor is to be paid seventy-five per cent of the value of materials furnished and delivered to said A. Paladini, Inc., in San Francisco for delivery to site of wharf at Pt. Reyes and in addition thereto seventy-five per cent of Labor expended in the construction of said wharf. [356]

The balance of twenty-five per cent and any other sum due said Healy-Tibbitts Construction Company under this agreement is to be paid thirty-five days after the completion of said structure.

PROVIDED, that when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from the said Architect, stating that the payment or installment is due or work completed, as the case

(Testimony of Charles Kruger.)

may be, and the amount then due; and the said Architect shall at said times deliver said certificates under his hand to the Contractor, or in lieu of such certificates, shall deliver to the Contractor in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the Contractor to the certificate or certificates. And in the event or failure of the Architect to furnish and deliver said certificates, or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the Contractor, the amount which may be claimed to be due by the Contractor, and stated in the said demand made by him for the certificate, shall, at the expiration of said three days, become due and payable, and the Owner shall be liable and bound to pay the same on demand.

In case the Architect delivers the writing aforesaid in lieu of the certificate, then a compliance by the Contractor with the requirements of said writing shall entitle the Contractor to the certificate.

SIXTH. For any delay on the part of the Owner in [357] making any of the payments or installments provided for in this contract after they shall become due and payable, he shall be liable to the Contractor for any and all damages which the latter may suffer; and such delay shall, in addition, operate as an *addivition* extension of the time for completion aforesaid for the length of time of such

delay. And such delay, if for more than five days after date when said payments or installments shall have respectively become due and payable, as in this agreement provided, shall, at the option of the Contractor, be held to be prevention by the Owner of the performance of this contract by the Contractor.

SEVENTH. The specifications and drawings are intended to co-operate, so that any work exhibited in the drawings are not mentioned in the specifications, or *vice versa,* are to be executed the same as of both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together. But no part of said specifications that is in conflict with any portion of this agreement, or that is not actually descriptive of the work to be done thereunder, or of the manner in which said work is to be executed, shall be considered as any part of this agreement, but shall be utterly null and void, and anything that is expressly stated, delineated or shown in or upon the specifications or drawings shall govern and be followed, notwithstanding anything to the contrary in any other source of information or authority to which reference may be made.

EIGHTH. Should the Owner or Architect, at any time during the progress of the work, request any alterations or deviations in, additions to, or omissions from, this contract [358] or the plans or specifications, either of them shall be at liberty to do so, and the same shall in no way affect

or make void this contract; but the amount thereof shall be added to, or deducted from, the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation. And this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes, whatever may be the nature or extent thereof. No such change or modification shall release or exonerate any surety or sureties upon any guaranty or bond given in connection with this contract.

NINTH. The rule of practice to be observed in the fulfillment of the last foregoing paragraph (eight) shall be that, upon the demand of either the Contractor, Owner or Architect, the character and valuation of any or all changes, omissions, or extra work, shall be agreed upon and fixed in writing, signed by the Owner or Architect and the Contractor, prior to execution.

TENTH. Should any dispute arise between the Owner and Contractor, or between the Contractor and Architect, respecting the true construction of the drawings or specifications, or respecting the manner or sufficiency of the performance of the work, the same shall, in the first instance, be decided by the Architect; but should either of the parties be dissatisfied with the justice of such decision, or should any dispute arise between the parties hereto respecting the valuation of extra work, work done or work omitted, the disputed matter shall be referred to, and decided by two competent persons who are experts in the business

of building—one to be selected by the Owner or [359] Architect, and the other by the Contractor; and in case they cannot agree, these two shall select an umpire, and the decision of any two of them shall be binding on all parties. Provided, however, that the work shall not be interrupted or delayed pending such decision, but shall proceed in accordance with the decision of the Architect, and said arbitrators shall have power to award adequate compensation to the Contractor in case they do not find such decision of the Architect to have been just.

ELEVENTH. Should the Contractor fail to complete this contract, and the works provided for therein, within the time fixed for such completion, due allowance being made for the contingencies provided for herein, he shall become liable to the Owner for all loss and damages which the latter may suffer on account thereof, but not to exceed the sum of $5.00 per day for each day said works shall remain uncompleted beyond such time for completion.

TWELFTH. In case said work herein provided for should, before completion, be wholly or partially destroyed by fire, defective soil, earthquake or other act of God which the Contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the Owner, and the Owner to agree to carry an Insurance for the full amount of the labor and material as the work progresses, in the joint name of the owner and Contractor. All moneys re-

ceived under such policies are to be divided between the Owner and Contractor as their interests may appear.

THIRTEENTH. The payment of the progress payments by the Owner shall not be construed as an absolute acceptance of the work done up to the time of such payments, except as to [360] such matters as are open and obvious; but the entire work is to be subject to inspection and approval of the Architect or Superintendent as to defects not obvious upon inspection during the progress of the work at the time when it shall be claimed by the Contractor that the contract and works are completed; but the Architect or Superintendent shall exercise all reasonable diligence in the discovery, and report to the Contractor, as the work progresses, of materials and labors which are not satisfactory to the Architect or Superintendent so as to avoid unnecessary trouble and cost to the Contractor in making good defective parts: otherwise, any objection thereto shall be deemed to have been waived.

FOURTEENTH. Should the Contractor, at any time during the progress of the work, refuse or neglect, without the fault of the Owner, Architect or Superintendent, to supply a sufficiency of materials or workmen to complete the Contract within the time limited herein, (due allowance being made for the contingencies provided for herein) for a period of more than five days after having been notified by the Owner in writing to furnish the same, the Owner shall have power to

furnish and provide said materials or workmen to finish the work; and the reasonable expense thereof shall be deducted from the amount of the contract price.

IN WITNESS WHEREOF, the said parties have duly executed this Contract, the day and year first above written.

A. PALADINI, INC. (Seal)
By ALEX PALADINI, Pres. (Seal)
HEALY, TIBBITTS CONSTRUCTION CO. (Seal)
[Seal] By CHAS. C. HORTON,
Vice-President. (Seal) [360½]

As a part of said transaction with the foregoing contract, we, the undersigned, hereby undertake and guarantee that —— the Contractor named therein, will fully and faithfully keep and perform all the obligations thereof on his part to be performed, and will deliver said —— fully completed within the time therein specified free all liens and claims of any person performing labor thereon or furnishing materials therefor, or both. The liability of the surety is hereby fixed in the sum of —— Dollars.

————————————, Surety.
————————————, Surety.

(Trademark.)
THE BUILDERS' EXCHANGE
San Francisco,
California.
Incorporated July 5, 1890.
A. PALADINI COMPANY, Incorporated,
with
HEALY-TIBBITTS CONSTRUCTION CO.
Dated ——————————— 191——
FILED AT THE REQUEST OF
..... A. D. 191.... at .... min. past
..... o'clock .... M. ..... County
records. .....,
Recorder.
By .....,
Deputy Recorder. [361]

SUPPLEMENTAL AGREEMENT.

ARTICLES OF AGREEMENT.

Made this first day of June one thousand nine hundred and twenty-three

BETWEEN A. Paladini, Inc. hereinafter called the Owner, and Healy-Tibbitts Construction Co. hereinafter called the Contractor

WITNESSETH: The words, Contractor and Superintendent used herein in the singular shall include the plural, and the masculine the feminine.

FIRST. The Contractor agrees, within the space of sixty working days from and after the date of this agreement to furnish the necessary labor and materials, including, tools, implements and appliances, require, and perform and complete in

a workmanlike manner, free from any and all liens and claims of artisans, material men, sub-contractors and laborers thereon, an additional 40 ft. to the 30 ft. section of the Wharf; all in accordance with the blue print entitled "Pier and Approach at Point Reyes, California, for A. Paladini Company, Inc.," which has been signed by both parties to this agreement and made a part hereof, and described in and by, and in conformity with the written proposal of said Healy-Tibbitts Construction Company addressed to A. Paladini Company, Inc., dated June 1, 1923, which is hereby incorporated into and made part of this agreement.

SECOND. Said Architect shall provide and furnish to the Contractor all details and working drawings necessary to properly delineate said plans and specifications; and the work is to be done and the materials furnished in accordance therewith under the direction and supervision and subject to [362] the approval of said Architect, or a Superintendent selected and agreed upon by the parties hereto, within a fair and equitable construction of the true intent and meaning of said plans and specifications.

THIRD. A reasonable allowance for the time during which the Contractor is delayed in said work by the acts or neglects of the Owner or his employees, or those under him by contract or otherwise, or by the acts of God which the Contractor could not have reasonably foreseen and provided for, or by storm and inclement weather which delays the work, or by *an* strike, boycotts, or like obstructive

action by employee or labor organizations, or by an general lockouts or other defensive action by employers, whether general, or by organizations of employers, shall be added to the aforesaid time for completion.

FOURTH. Said extension is to be erected to the satisfaction of J. Del Favero, Superintendent for said A. Paladini, Inc.

FIFTH. The Owner agrees, in consideration of the performance of this agreement by the Contractor, to pay, or cause to be paid, to the Contractor, his legal representatives or assigns, the sum of Seventeen Hundred Dollars ($1700.00) dollars in United States Gold Coin, at times and in the manner following, to wit:

On the 5th day of each month the contractor is to be paid seventy-five per cent of the value of materials furnished and delivered to said A. Paladini, Inc., in San Francisco, for delivery to site of extension at Pt. Reyes and in addition thereto seventy-five per cent of labor expended in the construction of said extension. [363]

The balance of twenty-five per cent and any other sum due said Healy-Tibbitts Construction Company under this agreement is to be paid thirty-five days after the completion of said structure.

PROVIDED, that when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from the said Architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and

the said Architect shall at said times deliver said certificates under his hand to the Contractor, or in lieu of such certificates, shall deliver to the Contractor in writing under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the Contractor to the certificate, or certificates. And in the event or failure of the Architect to furnish and deliver said certificates, or any of them or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the Contractor, the amount which may be claimed to be due by the Contractor, and stated in the said demand made by him for the certificate, shall, at the expiration of said three days, become due and payable, and the Owner shall be liable and bound to pay the same on demand.

In case the Architect delivers the writing aforesaid in lieu of the certificate, then a compliance by the Contractor with the requirements of said writing shall entitle the Contractor to the certificate.

SIXTH. For any delay on the part of the Owner in making any of the payments or installments provided for in [364] this contract after they shall become due and payable, he shall be liable to the Contractor for any and all damages which the latter may suffer; and such delay shall, in addition, operate as an additional extension of the time for completion aforesaid for the length of time of such delay. And such delay, if for more than five days after the date when said payments

or installments shall have respectively become due and payable, as in this agreement provided, shall, at the option of the Contractor, be held to be prevention by the Owner of the perfomance of this contract by the Contractor.

SEVENTH. The specifications and drawings are intended to co-operate, so that any work exhibited in the drawings are not mentioned in the specifications, or *vice versa,* are to be executed the same as of both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together. But no part of said specifications that is in conflict with any portion of this agreement, or that is not actually descriptive of the work to be done thereunder, or of the manner in which said work, is to be executed, shall be considered as any part of this agreement, but shall be utterly null and void, and anything that is expressly stated, delineated or shown in or upon the specifications or drawings shall govern and be followed, notwithstanding anything to the contrary in any other source of information or authority to which reference may be made.

EIGHTH. Should the Owner or Architect, at any time during the progress of the work, request any alterations or deviations in, additions to, or omissions from, this contract or the plans or specifications, either of them shall [365] be at liberty to do so, and the same shall in no way affect or make void this contract; but the amount thereof shall be added to, or deducted from, the amount

of the contract price aforesaid, as the case may be, by a fair and reasonable valuation. And this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes, whatever may be the nature or extent thereof. No such change or modification shall release or exonerate any surety or sureties upon any guaranty or bond given in connection with this contract.

NINTH. The rule of practice to be observed in the fulfillment of the last foregoing paragraph (eight) shall be that, upon the demand of either the Contractor, Owner or Architect, the character and valuation of any or all changes, omissions, or extra work, shall be agreed upon and fixed in writing, signed by the Owner or Architect and the Contractor, prior to execution.

TENTH. Should any dispute arise between the Owner and Contractor, or between the Contractor and Architect, respecting the true construction of the drawings or specifications, or respecting the manner or sufficiency of the performance of the work, the same shall, in the first instance, be decided by the Architect; but should either of the parties be dissatisfied, with the justice of such decision, or should any dispute arise between the parties hereto respecting the valuation of extra work, work done or work omitted, the disputed matter shall be referred to, and decided by two competent persons who are experts in the business of building—one to be selected by the Owner or Architect, and the other by the Contractor; and in

case they cannot [366] agree, these two shall select an umpire, and the decision of any two of them shall be binding on all parties. Provided, however, that the work shall not be interrupted or delayed pending such decision, but shall proceed in accordance with the decision of the Architect, and said arbitrators shall have power to award adequate compensation to the Contractor in case they do not find such decision of the Architect to have been just.

ELEVENTH. Should the Contractor fail to complete this contract, and the works provided for therein, within the time fixed for such completion, due allowance being made for the contingencies provided for herein, he shall become liable to the Owner for all loss and damages which the latter may suffer on account thereof, but not to exceed the sum of $—— per day for each day said works shall remain uncompleted beyond such time for completion.

TWELFTH. In case said work herein provided for should, before completion, be wholly or partially destroyed by fire, defective soil, earthquake or other act of God which the Contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the Owner, and the Owner to agree to carry an Insurance for the full amount of the labor and material as the work progresses, in the joint name of the Owner and Contractor. All moneys received under such policies are to be divided be-

tween the Owner and Contractor as their interest may appear.

THIRTEENTH. The payment of the progress payments by the Owner shall not be construed as an absolute acceptance of the work done up to the time of such payments, except as [367] as to such matters as are open and obvious; but the entire work is to be subject to inspection and approval of the Architect or Superintendent as to defects not obvious upon inspection during the progress of the work at the time when it shall be claimed by the Contractor that the contract and works are completed; but the Architect or Superintendent shall exercise all reasonable diligence in the discovery, and report to the Contractor, as the work progresses, of materials and labors which are not satisfactory to the Architect or Superintendent, so as to avoid unnecessary trouble and cost to the Architect or Superintendent, so as to avoid unnecessary trouble and cost to the Contractor in making good defective parts: otherwise, any objection thereto shall be deemed to have been waived.

FOURTEENTH. Should the Contractor, at any time during the progress of the work, refuse or neglect, without the fault of the Owner, Architect or Superintendent, to supply a sufficiency of materials or workmen to complete the contract within the time limited herein (due allowance being made for the contingencies provided for herein) for a period of more than five days after having been notified by the Owner in writing to furnish the

same, the Owner shall have power to furnish and provide said materials or workmen to finish the said work; and the reasonable expense thereof shall be deducted from the amount of the contract price.

IN WITNESS WHEREOF, the said parties have duly executed this contract, the day and year first above written.

———————. (Seal)
———————. (Seal)
HEALY, TIBBITTS CONSTRUCTION CO. (Seal)
W. H. HEALY, (Seal)
President. [368]

As a part of the same transaction with the foregoing contract, we, the undersigned, hereby undertake and guarantee that —— the Contractor named therein, will fully and faithfully keep and perform all the obligations thereof on his part to be performed, and will deliver said —— fully completed within the time therein specified free all liens and claims of any person performing labor thereon or furnishing materials therefor, or both. The liability of the surety is hereby fixed in the sum of —— Dollars.

———————, Surety.
———————, Surety.

(Trademark.)
THE BUILDERS' EXCHANGE.
San Francisco,
California.
Incorporated July 5, 1890.
with

Dated ....., 191....
FILED AT THE REQUEST OF
.....A. D. 191...., at .... min. past
..... o'clock .....M.....
.....County records .....
Recorder.

By .....,
Deputy Recorder. [369]

[Endorsed]: (No.) 18,142. Petitioner's Exhibit 1. Filed Aug. 5, 1924. J. A. Schaertzer, Deputy Clerk. [370]

PETITIONER'S EXHIBIT No. 2.

Serial Number 109584 — File No. L–13034. Issue Number–1–1.

UNITED STATES DEPARTMENT OF COMMERCE.

STEAMBOAT INSPECTION SERVICE.

LICENSE TO CHIEF ENGINEER OF STEAM VESSELS.

THIS IS TO CERTIFY THAT ORVILLE DAVIS, having been duly examined by the undersigned United States Local Inspectors, Steamboat Inspection Service, for the district of San Francisco, Cal., as to his knowledge of steam machinery

and as to his experience, and found to be competent, is hereby licensed to act as Chief Engineer on —— condensing OCEAN steam vessels of not over—750 —gross tons for the term of five years from this date FIRST ASSISTANT ENGINEER OF OCEAN STEAMERS 1000 GROSS TONS AND SECOND ASSISTANT ENGINEER OCEAN STEAMERS ANY GROSS TONS. GIVEN UNDER OUR HANDS THIS 2d DAY OF MAY, 1924.

JOSEPH P. DOLAN,
U. S. Local Inspector of Boilers.
FRANK H. TURNER,
U. S. Local Inspector of Hulls.

No. 18142. U. S. Dist. Court, Nor. Dist. Calif. Petrs. Exhibit 2 (3 sheets). Filed Aug. 6, 1924. J. A. Schaertzer, Dep. Clerk. [371]

Serial Number 12283 — Filed No. L–13034. Issue Number—2.

UNITED STATES DEPARTMENT OF COMMERCE.

STEAMBOAT INSPECTION SERVICE.

LICENSE TO ENGINEER OF VESSELS PROPELLED BY GAS, FLUID, NAPHTHA, OR ELECTRIC MOTORS.

THIS IS TO CERTIFY THAT Orville Davis, having been duly examined by the undersigned United States Local Inspectors, Steamboat Inspection Service, for the district of San Francisco, Calif., as to his qualifications for position of engi-

neer of motor vessels, and found competent, is hereby licensed as an Engineer of vessels of any gross tons, and of above fifteen gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha or electric motors, and of more than sixty-five feet in length, for the term of five years from this date.

Given under our hands this 18th day of February, 1920.

HARRY W. RAVENS,
U. S. Local Inspector of Hulls.

SAVINE L. CRAFT,
U. S. Local Inspector of Boilers. [372]

Serial Number 104268 — Filed No. L–13034. Issue Number—3.

UNITED STATES DEPARTMENT OF COMMERCE.
STEAMBOAT INSPECTION SERVICE.
LICENSE

TO OPERATE OR NAVIGATE VESSELS NOT MORE THAN SIXTY-FIVE FEET IN LENGTH PROPELLED BY MACHINERY, AND CARRYING PASSENGERS FOR HIRE, AND VESSELS OF FIFTEEN GROSS TONS OR LESS, PROPELLED IN WHOLE OR IN PART BY GAS, GASOLINE, PETROLEUM, NAPHTHA, FLUID, OR ELECTRICITY, AND CARRYING PASSENGERS FOR HIRE.

ORVILLE DAVIS

is hereby licensed under the provisions of Acts of

Congress approved June 9, 1910, and May 16, 1906, by the Board of Local Inspectors, Steamboat Inspection Service, for *for* the District of San Francisco, Calif., for the term of five years, from the date of issue of this license, to operate or navigate vessels not more than sixty-five feet in length propelled by machinery, and carrying passengers for hire, and vessels of fifteen gross tons or less, propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire.

Given under our hands this 30th day of July, 1920.

JAMES GUTHERS,
U. S. Local Inspector of Hulls.

JOSEPH P. DOLAN,
U. S. Local Inspector of Boilers. [373]

Permanent or Temporary
PERMANENT
License No. 7

THE UNITED STATES OF AMERICA

OFFICIAL NO.	LETTERS
218372	-

DEPARTMENT OF COMMERCE
BUREAU OF NAVIGATION

Measured at San Francisco, Calif. 19
Rebuilt at - 19
Remeasured at - 19

Radio call: -
Service: O. fishing
Number of Crew: 2

License of Vessel under Twenty Tons

(Secs. 4320, 4321, and 4324, Revised Statutes, Act of April 24, 1906)

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States

Joseph Chiesa of San Francisco, State of California, Secretary,

having taken and subscribed the oath - *required by law, and having sworn* - *that*
"A. Paladini Incorporated", a corporation organized under the laws of the State of California, and having its principal place of business at San Francisco, State aforesaid, is

~~[illegible]~~ *the sole owner of the vessel called the*

THREE SISTERS (Name of vessel) *of* San Francisco (Home port)
whereof A.M.Jacobsen *, a citizen of the United States, is master,*
and that the said vessel was built in the year 1917 *, at* Oakland, Calif. *, of* wood
as appears by Certificate of William Cryer, Master builder, now on file in this office,

and T.C.Eagar, Admeasurer of Vessels, *having certified that*
the said vessel is a Gas screw *; that she has*
one *deck ,* two *masts, a* plain *head, and a* round *stern; that*
her register length is 56.3 *feet, her register breadth* 15.6 *feet, her register depth* 6.- *feet.*

	Tons	100ths
Capacity under tonnage deck,	28	28
Capacity between decks above tonnage deck,		
Capacity of inclosures on the upper deck, viz: Forecastle ....; *bridge* ....; *poop* ....; *break* ....; *houses—round* ...., *side* ...., *chart* ...., *radio* ....; *excess hatchways* nil ; *light and air*	—	—
Gross tonnage,	28	28

Deductions under Section 4153, Revised Statutes, as amended:
Crew space, 6.95 *; Master's cabin,* - 6.95
Steering gear, ...; *Anchor gear,* ....; *Boatswain's stores,* -;
Chart house, ...; *Donkey engine and boiler,* ....; *Radio house,* -;
Storage of sails, -; *Propelling power (actual space* 10.39 *),* 32% 9.04
Total deductions, 15.99 — 15.99
Net tonnage, 12 —

The following-described spaces, and no others, have been omitted, viz: Forepeak used for water ballast -, *aftpeak used for water ballast* -, *open forecastle* -, *open bridge* -, *open poop* -, *open shelter deck* -, *anchor gear* -, *steering gear* -, *donkey engine and boiler* -, *light and air* 2.99, *wheelhouse* 1.66, *galley* 1.53, *condenser* -, *water-closets* -, *cabins* -

Proof being had of her admeasurement, she shall not be employed in any trade, while this license shall continue in force, whereby the revenue of the United States shall be defrauded, and said master having also sworn that this license shall not be used for any other vessel, or for any other employment than is herein specified:

LICENSE is hereby granted for the said vessel to be employed in carrying on the Coasting Trade *for ONE YEAR from the date hereof, and no longer.*

GIVEN under my hand and seal at the PORT of San Francisco
District of San Francisco *, this* 28th *day of* July
in the year ONE THOUSAND NINE HUNDRED AND twenty four (1924).

G.A.Marshall
Deputy
Naval Officer.

N.S.Farley
Deputy
Collector of Customs.

A3

[1] Insert name and address of person by whom oath or affirmation was made.
[2] Substitute "affirmation" when necessary.
[3] Substitute "affirmed" when necessary.
[4] If there is only one owner write "he" or "she"; if more than one owner, write "he (or she) owning" and the part owned, "together with" followed by the names of other owners, their shares and addresses; if incorporated company is sole owner, or part owner, write after the corporate name "incorporated under the laws of the State of ——."
[5] Write the name exactly as marked on the vessel.
[6] Write "wood," "iron," "steel," or as required.
[7] Cite surrendered marine document or write "certificate of ——, builder," if first document of a new vessel.
[8] Write "said register," "said enrollment," or "said license." In the *first* document of a new vessel, give the name and title of the measurer.
11—4317

[9] For a steam or gasoline vessel write "steam (or gas) side-wheel," "steam (or gas) stern-wheel," "steam (or gas) screw," as case may be.
[10] Name and give tonnage of each compartment in double bottom and of each peak tank used other than for water ballast which is included herein.
[11] Carry total of all inclosures to spaces at end of next line.
[12] To be included in gross only when authorized by the Commissioner of Navigation.
[13] Insert tonnage representing actual machinery space used in ascertaining propelling power.
[14] To be exempted, cabins and staterooms for passengers must be on a deck which is not a deck to the hull; all other spaces except forepeak, afterpeak, and other water-ballast spaces must be on or above the upper deck to the hull. Give tonnage of such space.
[15] Write "Coasting Trade," "Cod Fishery," or "Mackerel Fishery."

INDORSEMENTS OF RENEWAL

Renewal No. 1. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

Renewal No. 2. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

Renewal No. 3. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

Renewal No. 4. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

Renewal No. 5. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

U. S. DIST. COURT NOR. DIST. CALIF. No. 18142 Aug 12, 1924

Renewal No. 6. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

218372 Cat. No. 1285

DEPARTMENT OF COMMERCE
BUREAU OF NAVIGATION

PERMANENT
(Permanent or Temporary.)

LICENSE OF VESSEL UNDER TWENTY TONS

FOR THE Coasting Trade
(Insert "Coasting Trade" or "Fisheries.")

No. 7 OF THE Ga.s. CALLED THE THREE SISTERS OF San Francisco

28.- gross, 12.- net,

ISSUED AT THE Port of San Francisco,Calif. July 28, 1919

WHERE SURRENDERED:

WHEN SURRENDERED:

WHY SURRENDERED:

U. S. CUSTOMS SERVICE PAID AUG 8 1924 SAN FRANCISCO

I hereby certify ... as recorded ... DISTRICT AND PORT OF SAN FRANCISCO AUG 8 1924

Renewal No. 7. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

Renewal No. 8. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

Renewal No. 9. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

Renewal No. 10. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

Renewal No. 11. Port of
The within-described LICENSE is hereby renewed for ONE YEAR from , 19
(SEAL) Naval Officer. (SEAL) Collector of Customs.

UPON EXPIRATION OF RENEWAL NO. 11, ISSUE A NEW MARINE PAPER ASSIGNING, IF NO OTHER CAUSE, "ALL RENEWAL SPACES FILLED."

INDORSEMENTS OF CHANGE OF MASTER

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
, Collector of Customs.

Port of , 19
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
11—4217 , Collector of Customs.

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CLAIMANT'S EXHIBIT "B."

THIS AGREEMENT made by and between A. PALADINI, INC., a corporation duly organized and existing under and by virtue of the laws of the State of California, hereinafter called the "CHARTERER," and the CROWLEY LAUNCH AND TUGBOAT COMPANY, a corporation also duly organized and existing under and by virtue of the laws of the State of California, hereinafter called the "OWNER."

WITNESSETH:

That the CHARTERER agrees to rent from the OWNER the barge known as CROWLEY No. 61, and to pay the OWNER for the use of said barge the sum of TEN ($10.00) DOLLARS per day.

That the CHARTERER agrees to insure the barge CROWLEY No. 61 in the name of the OWNER, for the sum of SIX THOUSAND DOLLARS ($6000.00) and to pay the premium on said insurance.

It is further mutually agreed that while the barge is under hire to the CHARTERER as aforesaid, the OWNER shall be under no personal liability for damage caused by such barge or any other causes to any cargo or goods or any other vessel or vessels, or the cargo thereof, or people thereon, or the crew of said barge, or men employed on board said barge, or to persons or property on shore; and the CHARTERER hereby assumes all of such risks and hereby undertakes and agrees to hold said barge and her OWNER harmless from all such

claims and the costs, expenses and attorney's fees on litigating the same, and all other claims of any kind or character, whether like or unlike these enumerated which shall arise from the use of said barge by the CHARTERER or from any act done on board or in loading, repairing or serving her. [376]

THE CHARTERER agrees to return the barge to the moorings from where taken at beginning of this charter in the same good condition as received, and in witness whereof, the parties hereto have executed these presents this —— day of ————, 1923.

A. PALADINI, INC.
By ALEX PALADINI,
Pres.

CROWLEY LAUNCH AND TUGBOAT CO.
By ROBERT W. GREENE.

BODEGA BAY.

PACIFIC OCEAN.

No. 18,142. U. S. Dist. Court, Nor. Dist. Calif. Claimants' Exhibit "B." Aug. 12, 1924. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: Charter Barge No. 61. Paladini. [377]

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

ADMIRALTY—No. 18,142.

In re the Petition of A. PALADINI, INC., a Corporation, for Limitation of Liability.

(OPINION.)

September 10, 1924.

IRA S. LILLICK, Esq., and Messrs. HOEFLER, COOK & LINGENFELTER, Proctors for Petitioner.

Messrs. HEIDELBERG & MURASKY and JOS. J. McSHANE, Esq., Proctors for Claimants.

PARTRIDGE (Orally).—In this matter the case was tried before the court upon a petition for limitation of liability and, under settled principles in a limitation of liability proceeding, the Court is entitled and should determine whether there is any liability at all.

The facts are that a firm of contractors in this city, Healy, Tibbitts Company, had contracted with A. Palidini, Inc., for the construction of a wharf at Point Reyes. The contract provided that Paladini should transport the barge upon which was situated the pile-driver, and the men—that is, the Healy-Tibbitts Construction Company's employees—to Pt. Reyes and back. For the transportation of that barge, the Crowley Launch and Towboat Com-

pany furnished to Paladini a certain bridle which consisted of two steel or iron cables with a contrivance at the end by which the hawser turns freely. [378]

The barge containing the pile-driver and a large quantity of piles was towed by the power-boat "Three Sisters," belonging to A. Paladini, Inc., up to Pt. Reyes, and the wharf was completed.

The "Three Sisters" then undertook the towing of the barge and pile-driver back to San Francisco. She took on board the employees of the Healy, Tibbitts Construction Company and started out from Pt. Reyes. The evidence is conflicting as to the length of the hawser; the captain and deck-hand of the "Three Sisters" testifying the length of the hawser was from five to six hundred feet, and the members of the Healy, Tibbitts Construction Company's gang testifying that in length the hawser was not over two hundred feet. Most of the men were on the barge when it left Pt. Reyes. When it got outside, however, about the place where the light buoy is, these men left the barge and went aboard the "Three Sisters." Four of them sat down in the stern to play cards. The captain testifies that he warned these men that this was a dangerous place. This is denied by the men. It is not, however, denied that it was a dangerous place, for the reason that the experience of all seafaring men has shown that the vicinity of where the hawser is fastened, when the vessel has another vessel to tow, is a dangerous place. As the vessel left the light

buoy, she encountered a very heavy ground swell, coming west by north. I think the evidence satisfactorily shows that the real cause of the accident was these ground swells. After she had proceeded for some distance, the bridle—that is to say, the two steel cables that formed a part of the tow—parted and the result was that the end of the hawser attached to the "Three Sisters" swung around and severely injured two of these men. They have brought suit in the Superior Court and the petition of A. Paladini, Inc., is here for limitation of liability. [379]

In the first place, it is perfectly clear that the petitioner is entitled to limitation of liability, as the Supreme Court has pointed out that the statutes for the limitation of liability are amongst the most salutary we have for the building up of a merchant marine and should be given the fullest effect by these courts.

In the briefs, attention is called to the fact that I have heretofore held that under Section 33 of the Seamen's Act, limitation statutes do not take away from a seaman the right to bring his action at common law. That holding, however, was entirely according to the terms of this section, which gives the seaman an election and the ground for that decision (which I think is correct) is that that election would not be possible if the seaman was compelled to come into Admiralty in a limitation proceeding. However, that may be, these men are not seamen; they were employees of an entirely different com-

pany and, of course, the Act does not apply to them at all.

I hold, therefore, that in any case, the vessel was entitled to limitation of liability.

But more than that, I am satisfied that there is no liability at all. The evidence in regard to the condition of the bridle and the length of the hawser is conflicting. I am satisfied, however, that the bridle was subjected to a proper inspection. The claimants insist that the doctrine of *res ipsa loquitur* should apply. I doubt very much it does apply whether or not these men were strictly passengers; whether it does apply or not, it seems to me the evidence is convincing that the accident was either an inevitable one or else that it was due to the ground swells. The evidence shows that owing to the ground swells, the "Three Sisters" was lifted on the crest of the swell at the same time the barge went down into the trough, thereby causing an unusual strain upon the cable. [380]

I think, therefore, the liability must be denied *in toto*. The parties will present a decree in accordance with this opinion.

[Endorsed]: Filed Sep. 10, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [381]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held in the courtroom thereof, in the City and County of San Francisco, on Wednesday, the tenth day of September, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable JOHN S. PARTRIDGE, District Judge.

No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

MINUTES OF COURT — SEPTEMBER 10, 1924 — ORDER THAT LIABILITY BE DENIED IN TOTO.

This matter having been heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion thereon, it was, in accordance with said opinion, ordered that the liability must be denied *in toto* and that a decree be signed, filed and entered herein.

Vol. 63, page 516. [382]

In the District Court of the United States of America, in and for the Northern District of California, Third Division.

IN ADMIRALTY—No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

FINAL DECREE.

A verified libel and petition having been filed in this court by the above-named petitioner on March 4, 1924, praying for exemption from or liability for certain loss, damage, destruction and injury growing out of a towage accident on board their motorship "Three Sisters" which occurred on or about the 8th day of June, 1923, on the waters of the Pacific Ocean off the coast of California, between the *point* of *Port* Reyes and the port of San Francisco.

And an order having been duly entered whereby it was referred to a Commissioner to take proof of and ascertain the value of the interest of the petitioner in the motorship "Three Sisters," and in her freight pending, under the statutes and rules in relation to exemption from and limitation of liability.

And the said Commissioner having reported the interest [383] of such petitioner in the vessel at the sum of fifteen thousand eight hundred and

ninety dollars ($15,890), and that she had no freight pending on the voyage on which said accident occurred, which said voyage closed at the port of San Francisco on the 8th day of June, 1923, and petitioner having duly filed an approved stipulation in such amount.

And an order having been duly entered directing a monition to issue under the seal of this court against all persons claiming damages for any loss, destruction, damage or injury arising from or growing out of said accident, citing them to appear before this Court and make due proof of their respective claims on or before the 1st day of May, 1924, and designating Francis Krull, Esq., as the Commissioner before whom claims should be presented in pursuance of said monition.

And William Carlsen having presented a claim for personal injuries in the sum of fifty thousand nine hundred sixty dollars ($50,960), and John Sauder having presented a claim for personal injuries amounting to fifty thousand eight hundred dollars ($50,800), and Aetna Life Insurance Company, a corporation, having presented a claim for personal injuries to William Carlsen for fifty thousand nine hundred sixty dollars ($50,960) claiming jointly with William Carlsen by reason of said Aetna Life Insurance Company's claimed right of subrogation under the Workmen's Compensation Insurance & Safety Act of 1917 of the State of California, and Aetna Life Insurance Company, a corporation, having presented a claim for personal injuries to John Sauder in the sum of fifty thou-

sand eight hundred dollars ($50,800) claiming jointly with John Sauder by reason of said Aetna Life Insurance Company's claimed right of subrogation under the Workmen's Compensation Insurance & Safety Act of 1917 of the State of California; all of which claims more fully appear from the Commissioner's report on claim on file herein.

And no other person having presented any claim, and the [384] defaults of all other persons having been duly entered; and said claimants having answered the said libel and petition, and the case having come on for trial on the pleadings and proofs of the petitioner and of said claimants, and having been argued by the proctors of the respective parties; and the Court having filed its decision that the accident and the loss, destruction, damage and injury arising therefrom were not caused by the design or negligence of the petitioner, or with its privity or knowledge, as appears by the opinion on file.

Now, on motion of Ira S. Lillick, Esq., and Hoeffler, Cook & Lingenfelter, Esqs., proctors for petitioner, it is by the Court

ORDERED, ADJUDGED AND DECREED:

1. That the accident described in the libel and petition herein was not caused by the design or negligence of the petitioner, A. Paladini, Inc., a corporation, and did not occur with the privity or knowledge of said petitioner.

2. That said petitioner be and it is forever exempt and discharged from all liability for or on

account of any loss, damage, destruction or injury arising from or growing out of said accident.

3. That said claimants, William Carlsen, John Sauder and Aetna Life Insurance Company, a corporation, and each of them, their and each of their representatives, agents, assigns, attorneys and proctors, be and they are hereby forever restrained and enjoined from commencing, prosecuting or maintaining any action or actions in any court whatsoever against said petitioner by reason of said accident.

4. That said petitioner recover from said claimants its costs incurred in establishing its exemption from liability in this proceeding, taxed at the sum of two hundred eighty-six 65/100 dollars ($286.65).

Dated October 15th, 1924.

JOHN S. PARTRIDGE,
United States District Judge. [385]

Receipt of a copy of the within proposed final decree admitted this 17th day of September, 1924.

HEIDELBERG & MURASKY and
JOS. J. McSHANE,
Proctors for Claimants William Carlsen and John Sauder.

BELL & SIMMONS,
Proctors for Claimant Aetna Life Insurance Company, a Corporation.

[Endorsed]: Entered in Vol. 17, Judg. and Decrees, at page 456.

Lodged Sep. 18, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [386]

In the District Court of the United States of America in and for the Northern District of California, Third Division.

IN ADMIRALTY—No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

NOTICE OF APPEAL.

To A. Paladini, Inc., Petitioner in the Above-entitled Cause, and to Messrs. Hoeffler, Cook & Lingenfelter and Ira S. Lillick, Its Proctors, and to W. B. Maling, Clerk of the United States District Court for the Southern Division of the Northern District of California, Third Division, in Admiralty.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, that William Carlsen, John Sauder and Aetna Life Insurance Company, a corporation, claimants in the above-entitled cause, do and each of them does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States for the Southern Division of the Northern District of California, Third Division, sitting in Admiralty, entered in the above-entitled cause on the 15th day of October, 1924, and from the whole of said final decree.

Dated: San Francisco, California, November 17th, 1924.

BELL & SIMMONS,
REDMAN & ALEXANDER,
JOSEPH J. McSHANE,
HEIDELBERG & MURASKY,
Proctors for Claimants. [387]

Receipt of a copy of the within notice of appeal is admitted this 17 day of November, 1924.

IRA S. LILLICK,
HOEFLER, COOK & LINGENFELTER,
Proctors for Petitioners.

[Endorsed]: Filed Nov. 18, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [388]

In the District Court of the United States of America, for the Northern District of California, Third Division.

IN ADMIRALTY—No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

ASSIGNMENT OF ERRORS.

Now comes William Carlsen, John Sauder and Aetna Life Insurance Company, a corporation, appellants in the above-entitled cause, and assigns, and each of them assigns, errors therein as follows:

I.

The District Court erred in adjudging in its final decree of date October 15th, 1924, that the accident described in the libel and petition was not caused by the negligence of petitioner, and in adjudging that said accident did not occur with the privity or knowledge of petitioner.

II.

The District Court erred in adjudging in said final decree that petitioner be and is forever exempt and discharged from all liability for or on account of any loss, damage, destruction or injury arising from or growing out of said accident, in so far as said final decree applies to appellants.

III.

The District Court erred in said final decree in restraining and enjoining appellants, or any of them, or [389] their representatives, agents, assigns, attorneys or proctors from commencing, prosecuting or maintaining any action or actions in any court against said petitioner by reason of said accident.

IV.

The District Court erred in said final decree in adjudging that petitioner recover from appellants any costs in said proceeding.

V.

The District Court erred in adjudging that petitioner was not liable to appellants at all.

VI.

The District Court erred in adjudging that petitioner was entitled to limit its liability in respect to

the claims of appellants, or the claim of any of them.

VII.

The District Court erred in not entering a decree adjudging that petitioner was liable to appellants and each of them, for all loss, damage and injury sustained by them growing out of the accident described in the libel and petition herein.

VIII.

The District Court erred in not entering a decree adjudging that petitioner was not entitled to limit its said liability with respect to the claims of appellants.

IX.

The District Court erred in its opinion in finding and stating that the vessel "Three Sisters" on the voyage involved in the case "encountered a very heavy ground swell." [390]

X.

The District Court erred in its opinion in finding and stating that "the evidence satisfactorily shows that the real cause of the accident was these ground swells."

XI.

The District Court erred in not finding and holding that on said voyage the vessel encountered only ordinary ground swells of the kind usually encountered and to be expected in the waters in question at the time in question.

XII.

The District Court erred in its opinion in finding and stating that the bridle with which the

"Three Sisters" was towing the barge "was subjected to a proper inspection."

XIII.

The District Court erred in its opinion in finding and stating that "the evidence in convincing that the accident was either an inevitable one, or else that it was due to the ground swells."

XIV.

The District Court erred in its opinion in finding and stating that "the evidence shows that owing to the ground swells the 'Three Sisters' was lifted on the crest of the swell at the time that the barge went down into the trough, thereby causing an unusual strain upon the cable."

XV.

The District Court erred in not finding and holding that the accident was not inevitable.

XVI.

The District Court erred in not finding and holding that the bridle used by the "Three Sisters" was unsound, [391] rotten and defective, and that the accident resulted from such condition thereof, and that petitioner is liable therefor.

XVII.

The District Court erred in not finding and holding that if the accident was due to ground swells, it was not inevitable and that petitioner is liable therefor.

XVIII.

The District Court erred in not finding and holding that neither the master nor the single deckhand constituting the entire crew of the "Three

Sisters" ever inspected the towing equipment used by her, and that petitioner is therefore liable.

XIX.

The District Court erred in not finding and holding that no one inspected the towing equipment used by the "Three Sisters" at the beginning of the voyage from Point Reyes, the voyage on which the accident occurred, and that petitioner is therefore liable.

XX.

The District Court erred in not finding and holding that no one inspected such towing equipment before the beginning of the voyage from San Francisco to Point Reyes, and that petitioner is therefore liable.

XXI.

The District Court erred in not finding and holding that neither Carlton, Davis nor Krueger, employed by petitioner, were competent to fill their respective positions and that petitioner is therefore liable. [392]

XXII.

The District Court erred in not finding and holding that the master of the "Three Sisters" on the voyage on which the accident occurred, negligently managed his tow, in that he towed with too short a tow-line, did not vary the length thereof or manipulate his engines in order to keep the tow safe, and that petitioner is therefore liable.

XXIII.

The District Court erred in its opinion in finding and stating that the place where the injured ap-

pellants were on the "Three Sisters" at the time of the accident was a dangerous place, and in finding and stating that "the experience of all seafaring men has shown that the vicinity of where the hawser is fastened, when the vessel has another vessel in tow, is a dangerous place."

XXIV.

The District Court erred in not finding and holding that if the place where the injured appellants were at the time of the accident was a dangerous place, the master failed to warn the injured appellants therefrom, and failed to see to it that they did remove therefrom, and that petitioner is therefore liable to appellants.

XXV.

The District Court erred in not finding and holding that where the injured appellants were on said vessel was a safe and proper place for them to be.

XXVI.

The District Court erred in not finding and holding that petitioner was privy to and had knowledge of the unsound, rotten and defective condition of said towing bridle and of the incompetence and negligence of its employees aforesaid. [393]

XXVII.

The District Court erred in not finding and holding that the negligence of its master was petitioner's negligence under the Limitation of Liability Acts.

XXVIII.

The District Court erred in not holding and finding that the negligence of its port engineer was peti-

tioner's negligence under the Limitation of Liability Acts.

XXIX.

The District Court erred in not finding and holding that petitioner is not entitled to limit its liability because its master and port engineers were incompetent.

XXX.

The District Court erred in not finding and holding that petitioner is not entitled to limit its liability for the reason that the injured appellants were passengers and petitioner failed to comply with the inspection laws of the United States.

XXXI.

The District Court erred in failing to take into consideration the provisions of Section 4493 of the Revised Statutes of the United States, the amendments thereto, and the provisions therein referred to.

Dated: November 17th, 1924.

BELL & SIMMONS,
REDMAN & ALEXANDER,
HEIDELBERG & MURASKY,
JOSEPH J. McSHANE,
Proctors for Appellants. [394]

Receipt of a copy of the within assignment of errors is admitted this 17th day of November, 1924.

HOEFFLER, COOK & LINGENFELTER,
IRA S. LILLICK,
Proctors for Claimants.

[Endorsed]: Filed Nov. 18, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [395]

In the District Court of the United States of America, for the Northern District of California, Third Division.

IN ADMIRALTY—No. 18,142.

In the Matter of the Petition of A. PALADINI, INC., a Corporation, Owner of the Motorship "THREE SISTERS," for Limitation of Liability.

STIPULATION AND ORDER RE ORIGINAL EXHIBITS.

IT IS HEREBY STIPULATED by the parties hereto that petitioner's original exhibit numbered four (4) and claimant's original Exhibit "A" introduced in evidence at the trial hereof, may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: November 17th, 1924.

BELL & SIMMONS,
REDMAN & ALEXANDER,
JOSEPH J. McSHANE,
HEIDELBERG & MURASKY,
Proctors for Appellants.

HOEFLER, COOK & LINGENFELTER,
IRA S. LILLICK,
Proctors for Appellee.

It is so ordered.
November 18, 1924.

BOURQUIN,
District Judge.

[Endorsed]: Filed Nov. 18, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [396]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 396 pages, numbered from 1 to 396, inclusive, contain a full, true and correct transcript of the records and proceedings, in the Matter of the Petition of A. Paladini, Inc., owner of the Motorship "Three Sisters," for Limitation of Liability, No. 18,142, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to the praecipe for the apostles on appeal and the instructions of the proctors for appellants herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of one hundred seventy-one dollars and seventy cents ($171.70), and that the same has been paid to me by the proctors for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of December, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. [397]

[Endorsed]: No. 4452. United States Circuit Court of Appeals for the Ninth Circuit. William Carlson, John Sauden and Aetna Life Insurance Company, a Corporation, Claimants of the Motorship "Three Sisters," Appellants, vs. A. Paladini, Inc., a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Third Division.

Filed December 30, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

No. 4452

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM CARLSEN, JOHN SAUDER and AETNA LIFE INSURANCE COMPANY (a corporation), claimants,

Appellants,

vs.

A. PALADINI, INC. (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

HEIDELBERG & MURASKY,
Flood Building, San Francisco.
JOSEPH J. McSHANE,
Flood Building, San Francisco,
Proctors for Appellants, Carlsen and Sauder.

REDMAN & ALEXANDER,
333 Pine Street, San Francisco,
BELL & SIMMONS,
Alaska Commercial Building, San Francisco,
Proctors for Appellant, Aetna Life Insurance Company.

Table of Contents

Table of Authorities Cited

No. 4452

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM CARLSEN, JOHN SAUDER and AETNA LIFE INSURANCE COMPANY (a corporation), claimants,

Appellants,

vs.

A. PALADINI, INC. (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

I.

STATEMENT OF THE CASE.

A. THE CASE A LIMITATION OF LIABILITY PROCEEDING.

The caption appearing on the apostles on appeal is inaccurate, and may be somewhat misleading if not corrected at the outset. This appeal is from a final decree of the District Court in a Limitation Of Liability Proceeding, wherein A. Paladini, Inc., the appellee, is the petitioner, and appellants are the claimants. Appellants are not "Claimants of the Motorship 'Three Sisters' ", as they are de-

(NOTE: Numerical references are to pages of Apostles.)

scribed in the caption of the apostles, but claimants in the Limitation Of Liability Proceeding filed by appellee, as owner of the motorship "Three Sisters", to limit liability for personal injuries sustained by appellants Carlsen and Sauder while on that vessel to her value. The matter was referred to a Commissioner to appraise the "Three Sisters", his appraisement was approved, and a stipulation in the sum of $15,918.00 for such appraised value was filed (3). Actions at law which appellants Carlsen and Sauder had filed in the Superior Court of California were stayed, and appellants filed their claims and answers to the petition in the limitation proceeding. It was stipulated by appellee that claimant Aetna Life Insurance Company might intervene and file claims and answers in the limitation proceeding (29), which it did (30). The intervention of the Aetna Company was for its protection as insurer of the employer of Carlsen and Sauder against liability for compensation, in which capacity it became subrogated to the rights conferred by Section 26 of the California Workmen's Compensation Act upon such employer, and hence to a first lien against any judgment recovered by the employees Carlsen and Sauder, for the amount of compensation advanced or expended for them (30-35).

B. A BRIEF SUMMARY OF THE FACTS.

The facts, to which more detailed reference will be made in the proper course of the brief, may be

briefly stated as follows: Healy-Tibbitts Construction Company, a corporation, about April 25, 1923, entered into a contract (Petitioner's Ex. No. 1, 443-462) with appellee, A. Paladini, Inc., the owner of the motor boat "Three Sisters", for the construction, for appellee, of a wharf at Point Reyes. Appellants Carlsen and Sauder were employees of the Healy-Tibbitts Company, and as such were engaged in the building of said wharf. The letter (443-445), comprising part of the agreement between Healy-Tibbitts Company and appellee, provided that appellee should freight and deliver at Point Reyes all materials and equipment necessary to complete the wharf; that during the work appellee should deliver supplies for the men on the work three times a week; and that on completion of the wharf appellee should transport all equipment back to San Francisco.

Appellee's vessel "Corona" transported appellants Carlsen and Sauder, together with the other men employed by the Healy-Tibbitts Company, from San Francisco to Point Reyes at the commencement of the work. During the work appellee transported the supplies for it from San Francisco to Point Reyes, sometimes on its vessel "Corona", which went to Point Reyes for salmon (80, 83, 99, 100), sometimes on its vessel "Three Sisters". On week ends appellee transported divers of the Healy-Tibbitts Company's men who were engaged in constructing the wharf back and forth between Point

Reyes and San Francisco, sometimes on the "Corona", sometimes on the "Three Sisters", depending on which of the vessels happened to be making the trip at the time (Captain Kruger, 114 to 119, 144; Carlsen, 288, 289).

Appellee chartered from the Crowley Launch & Tugboat Company, the barge "Crowley No. 61", by a charter under which appellee assumed all responsibility arising from use of her by appellee (Claimants' Ex. B, 469). Obviously it was a *demise* charterparty which conferred upon appellee full possession and control of the barge. Appellee, on May 10, 1923 (283, 287), towed this barge, upon which a pile-driver furnished by the Healy-Tibbitts Company had been placed, from San Francisco to Point Reyes with its vessel "Three Sisters". Appellee, with the same vessel, on June 8, 1923, when the wharf had been completed, started to tow the barge from Point Reyes to San Francisco, with the pile-driver on board. The barge was made fast to the "Three Sisters" by a *7 inch manila line*, one end of which was made fast to the mast of the "Three Sisters", and the other end to a *thimble and swivel*. The timble and swivel were connected to a *bridle made of 5/8 or 7/8 inch steel cable*, the ends of which were made fast to towing bitts on the forward port and starboard corners of the barge, respectively.

On June 5, 1923, the "Three Sisters" went from San Francisco to Point Reyes to get the barge, but

her master was informed by appellant Carlsen, the foreman of the Healy-Tibbitts Company on the work, that they were not yet through with the pile driver and by him was requested to wait until they were ready. Accordingly the "Three Sisters" waited there for 3 days, alongside a fish barge, her captain sending word of the delay to appellee by the "Corona" (Cap. Kruger, 83; Andersen, 165; Carlsen, 290). *Appellee's port captain, Davis,* was at Point Reyes on June 7, 1923, the day before the "Three Sisters" started for San Francisco with the barge "Crowley No. 61" in tow, and appellant Carlsen told him that the captain of the "Three Sisters" was waiting for him, that the men were going back to San Francisco on her (Carlsen, 291, 292). On June 8, 1923, appellant Carlsen informed Captain Kruger that they were through with the wharf, and the "Three Sisters" then went to the Booth wharf at Point Reyes, picked up the camping utensils and luggage of appellants and the other men, and started for San Francisco with the barge in tow (Kruger, 85, 86; Andersen, 166, 167; Carlsen, 291, 292). Captain Kruger did not know whether the "Corona" was coming to Point Reyes on the day he left with the tow (Kruger, 84). An hour and a half after the "Three Sisters" left Point Reyes with the barge in tow, when, to use the language of appellee's counsel in summarizing the situation to appellee's expert witness (396) "the time was on the afternoon of June 8, 1923; *the weather was fair; the wind was light north-*

westerly; the sea was smooth except for westerly ground swells of the kind usually encountered in those waters at that time of the year", the *steel* bridle broke in *two* places, with the result alleged in appellee's petition: "the tow line whipped back and struck the said Carlsen and the said Sauder, inflicting upon them certain bodily injuries" (9). Appellants were at the time of the injury seated on the starboard side of the after deck of the "Three Sisters", playing cards with two other of the Healy-Tibbitts Company men, three or four feet away from the towing hawser (Cap. Kruger, 101). The blow knocked both men unconscious (Kruger, 96). They were injured on Friday, June 8, 1923. Carlsen did not recover consciousness until the following day (Carlsen, 335, 6), and Sauder did not recover consciousness for days later (Sauder, 436, 439). Sauder's skull was fractured, vertebrae in Carlsen's neck were dislocated, cord torn away from his skull, and his jaw injured (Carlsen 436).

C. CERTAIN DISPROVED ALLEGATIONS IN APPELLEE'S PETITION.

Before passing to the specification of errors and the argument, attention is called to the allegations in appellee's petition (7) to the effect that appellee maintained a "regular service" by the motorship "Corona" for the transportation of persons and property from Point Reyes to San Francisco, "which service was at said time used for the accom-

modation of the employees of Healy-Tibbitts Construction Company, and the said motorship 'Three Sisters' was not used in said service". The purpose of such allegations is plain: to show that appellants were not passengers or properly on the "Three Sisters". Such allegations (denied in appellants' answers, 17, 36) were clearly *disproved,* however, *by appellee's own witness Kruger,* who testified concerning his general and uncountermanded, standing orders with respect to the transportation of appellants and other passengers as follows:

> "Q. Then I still say you had orders from the port engineer, did you not, that if at any time the 'Corona' was not in San Francisco and the men wanted to go to Point Reyes, you were to take them on the 'Three Sisters'?
>
> A. *Yes, sir.*
>
> Q. And the same way, if at any time you were up at Point Reyes and the 'Corona' was not there, and the men were to come back, you were to bring them back?
>
> A. *Yes, sir.*
>
> * * * * * * *
>
> The COURT. I think he has made it clear, Mr. Heidelberg. He does not get this question, *but he has said that his general orders were to get these men when the other boat was not here"* (Kruger, 117, 118; also 114 to 119).
>
> "Q. When you said the 'Corona' carried passengers, you didn't mean to say that the 'Three Sisters' did not carry passengers, did you?
>
> *A. I carried passengers in case when the other boat was not up there"* (Kruger, 144).

The testimony of Kruger is corroborated by that of appellants' witnesses Carlsen (288-293), Urqu-

hart (43), Evans (339, 340), Haney (252), Reid (363), Rowe (423), Sauder (438).

Clearly related to the above disproved allegations in the petition, is the further allegation (7), with the same purpose, that:

> "When said Carlsen and said Sauder, and the said other men, ascertained that said motorship 'Three Sisters' was about to depart from the port of Point Reyes for the port of San Francisco, towing said barge, they refused to await passage on said motorship 'Corona' and boarded said barge."

These allegations (denied in appellants' answers, 17, 36), were clearly *disproved* by the above quoted testimony of appellee's *own master,* as well as by that of appellants' witnesses. They were also disproved by the testimony of Kruger:

> "Mr. LILLICK. Q. I am speaking of the time when they came on board the 'Three Sisters', did you ask them to come on, or did they ask you to come on, or how did that happen? A. They said they wanted to go down, *and I said 'All right'"* (Kruger, 94; also 83, 85, 86, 93, 95; Anderson, 167; Carlsen, 290-293; Reid, 364, 365).

In view of this testimony of appellee's *own master,* there can be no doubt that *appellants and the other five men who came down on the "Three Sisters"* were passengers:

> "The circumstance that the passenger was a 'steamboat man', and as such carried gratuitously, does not deprive him of the right to redress enjoyed by other passengers. It was

the custom to carry such persons free.

The master had power to bind the boat by giving such free passage."

The New World, 14 L. Ed. 1019 (Head Note); 16 How. 467. Appeal from Nor. Dist. of Calif.

"The expression 'passenger' shall include any person carried in a ship other than the master and crew, and the owner, his family and servants."

English Merchant Shipping Act, 1894, Sec. 267, printed in Maclachlan's Merchant Shipping 6th Ed., p. 640; Abbott on Shipping, 14th Ed., p. 1160.

See also:

Re Calif. Nav. & Imp. Co., 110 Fed. 670 (N. D. Calif.);

Steam Dredge No. 1, 122 Fed. 679;

The Wasco, 53 Fed. 546 (N. D. Wash.).

Hereafter, in the proper course of the argument, several other disproved and unproved material allegations in the petition which are denied in appellants' answers, will be noted.

II.

THE DECISION OF THE DISTRICT COURT AND SPECIFICATION OF ERRORS.

The opinion of the court below is printed in the apostles, pages 471-474. The assignment of errors

is to be found therein at pages 481-487. All of the errors assigned are hereby specified. The sum and substance of them is that the District Court erred in not holding that appellee is liable for the injuries sustained by appellants Carlsen and Sauder, and that appellee is not entitled to limit such liability to the value of the "Three Sisters". This, of course, involves the error that the court should have found that appellee corporation was negligent through and by its servants, and privy thereto so as to defeat limitation of liability. Particular attention is directed to the errors assigned under numbers IX to XXIX (483-487) which specify the particulars in which the court below erred in these respects. The positive findings of fact to which exception is taken in Assignments IX, X, XII, XIII, XIV are specially emphasized as being *wholly unsupported by the record, and, moreover, as incorrectly applying the legal doctrine of "inevitable accident"*. Assignments XXX and XXXI (487) are based upon the absence of any right in appellee to limit liability because of non-compliance with the statutory condition precedent that the vessel should have been inspected.

The errors are all seriously assigned and specified, and will be more particularly adverted to at appropriate points in the argument.

III.

THE ARGUMENT.

A. EFFECT OF THIS APPEAL AS A TRIAL DE NOVO OF THE CASE WITH RESPECT TO THE DISTRICT COURT'S FINDINGS OF FACT AND OMISSIONS TO FIND FACTS.

This appeal in admiralty, being a *trial de novo* of the case, the decree of the District Court has been vacated:

Reid v. Fargo, 241 U. S. 544; 60 L. Ed. 1157;
The Schooner John Twohy, 255 U. S. 77; 65 L. Ed. 511.

In the instant case all of the testimony was taken before the District Judge with the exception of the deposition of Urquhart (41-55). It is not expected, therefore, that this court will not give weight to the findings of the lower court where such findings involve *conflicting* evidence the *value* of which depended upon the *credibility* of the witnesses who were heard in open court.

But findings *contrary to all* of the evidence, or *against the decided weight* of the evidence, or *unsupported by any* evidence, will be disregarded; and where the lower court omitted to find facts material to the issues, notwithstanding they are proved by the evidence, *this court will review the case on such facts unaffected by any finding of fact of the court below:*

The Fullerton, 211 Fed. 833, at 834 (C. C. A. 9);
Hughes on Admiralty, 2nd Ed., pp. 419, 420;
The Kalfarli, 277 Fed. 391, at 397-399 (C. C. A. 2).

And as to the deposition of Urquhart, *who was not heard or seen by the court below,* this court's position is as good as was that of the District Judge:

The Santa Rita, 176 Fed. 893 (C. C. A. 9);
The Kalfarli, supra.

Appellants, in view of these principles, ask that this court *assume* that the *appearance* and *manner of testifying* of appellee's witnesses was *the most favorable that could be presented to eye or ear.* But appellants further request that where it is apparent *from the very substance* of the testimony of appellee's witnesses that they had *no actual recollection or knowledge* of the matters concerning which they were testifying, or that they were not testifying from *actual memory* of such matters, but merely from *imagination or inference* turned into or confused with recollection, *this court then use the combined intelligence of the three judges of which it is composed, without regard to the lower court's findings.* These remarks are to be specially borne in mind in reading the testimony of appellee's witness Davis (176-223); also that of appellee's witnesses Carlton (352-362) and Kruger (69-127; 136-147), in the particulars which will be designated in the argument. It will be noted that the references herein are to the testimony of *petitioner's own witnesses,* and to that of claimants' witnesses only where it is *corroborative* of petitioner's witnesses or *not in conflict* with them.

B. THE TWO ISSUES INVOLVED: (1) LIABILITY; AND (2) THE RIGHT TO LIMIT LIABILITY.

There are two distinct issues presented in this case.

The one issue is whether the petitioner was *negligent.* If it was *negligent,* either directly or *through its servants,* it is liable to the two injured claimants. There is involved in this issue no question of privity of knowledge on the part of the petitioner, and the ordinary doctrine of *respondeat superior* obtains.

> "The effect of the act is stated with conciseness and perspicuity by Mr. Justice Gray in Liverpool Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, as follows:
>
> 'That act leaves them (the shipowners) liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of their master and crew.' "
>
> Wolverton, J.: *Oregon Lumber Co. v. Portland & Asiatic SS. Co.,* 162 Fed. at 922 (D. C. Ore.).
>
> (Unseaworthiness found, and limitation denied.)
>
> *Diamond Coal & Coke Co. etc.,* 297 Fed. 246 (C. C. A. 3); Cert. Denied 68 L. Ed. 721.

The other issue is whether, the petitioner being guilty of negligence, its *liability* may nevertheless be limited to the surrender value of the "Three Sisters". If the case is one to which the statute permitting limitation of a shipowner's liability applies (and claimants assert that it is not such a case because of the statutory condition precedent

of inspection in the case of carriage of passengers), then in this issue the doctrine of *respondeat superior* is subject to qualification by virtue of the statute: *if the limitation of liability act is applicable,* the question of privity or knowledge on the part of petitioner is an issue.

It is respectfully submitted that the petitioner was *solely* at fault, and that it is not entitled to limit the liability for such fault; so that it is liable for the *full* damages actually sustained by the two men, although the amount of such damages may exceed the surrendered value of the "Three Sisters". It will be shown, *first,* that petitioner was *negligent,* without contributory negligence on the part of the men, and *then,* that it is *not entitled to limit* its liability for the full consequences of such negligence, because the limitation of liability law is not *applicable,* and even if it were applicable, petitioner *has not shown that it was without privity or knowledge* of such negligence.

First: The Petitioner Was Negligent.

The petitioner was negligent in divers particulars, which will now be designated. The issue of whether petitioner was negligent or not is raised by the *answers* (16-19; 30-40) of claimants to the petition (5-15). The *claims* of claimants, of course, were filed with the Commissioner, in accordance with the required practice in limitation proceedings (*Supreme Court Admiralty Rules,* 52, 53). The

main issue of negligence is the insufficiency of the bridle which the "Three Sisters" used to tow the barge; but there are other issues of negligence, corollary thereto. All of such issues are raised by the allegations of the petition and the denials thereof and allegations thereabout in the answers.

1. The Bridle and Swivel Used by the "Three Sisters" to Tow the Barge and Pile Driver Were Unsound, Rotten and Defective.

(a) Res Ipsa Loquitur.

It is respectfully submitted that there cannot be any doubt that the claimants are entitled to a decree adjudging petitioner negligent. Without resort to any of the record save petitioner's petition, statements of its counsel and the testimony of its witnesses, it is apparent that the bridle was defective. The facts established a *prima facie* case which petitioner has in no way rebutted. Indeed, as claimants' proctors pointed out in their opening statement (61, 62, 63, 67, 68, 69), the petition itself makes a *prima facie* case for claimants. But the record itself, as now will be demonstrated, *does not prove even the meager allegations of the petition,* with respect to such breakings of the bridle. The portions of the pleadings and the record pertinent to this point will first be designated, and then the law in the light of which they must be construed.

(a') The Facts.

The only allegations in the petition with respect to how the bridle broke are the following:

"While on said voyage, and while towing said barge, in the morning of the eighth day of June, 1923, and while out of said port of Point Reyes about *one hour and thirty minutes,* and off the coast of California, said Motorship and her tow encountered a *succession of long ground swells.* Upon encountering said ground swells the Master of said Motorship caused her to proceed on said voyage under half speed. The Master was at the wheel. *Suddenly while said Motorship was on the receding side of one of said ground swells,* and while going at half speed as aforesaid, the one side of the bridle upon said barge *was seen by the Master* of said Motorship *to part.* The Master immediately thereafter, and before any further breaking of said bridle, *disconnected* the engines of said Motorship from her propeller shaft, *but while not under any power from said Motorship, but while being carried forward by the force of said ground swells and of the sea,* the *other side* of said bridle upon said barge *parted,* completely disconnecting said Motorship from her tow" (Petition, 6, 7).

"Upon the parting of the bridle upon said barge, *the tow line whipped back and struck* the said Carlsen and the said Sauder, inflicting upon them certain bodily injuries" (Petition, 9).

The breaking was described as follows in the opening statement of petitioner's proctors:

"*One* side of this bridle broke; therefore, the *other* side broke—carried away—and the tautened line, suddenly giving away, whipped or in some way struck two of these men who were playing cards" (60).

"Mr. LILLICK. Your Honor, I am somewhat at a loss to comprehend the point Mr. Bell has been seeking to cover. It would seem to me

that he has said that because we have not used the phrase 'perils of the sea' we are foreclosed from proving how the accident happened and what occurred.

The COURT. No, I don't think that, Mr. Lillick. I could not agree with that. I think you had better go ahead with your evidence.

Mr. LILLICK. It was only for the purpose of having a statement from Mr. Bell as to whether he claims that the allegation of this petition, reading from page 2:

'But while not under any power from said motorship, but while being carried forward by the force of said ground swells and of the sea, the *other* side of said bridle upon said barge parted'—

is not a statement that because the disconnected engine of the motorship *left her on the sliding edge of a ground swell, forcing her one way, and that the barge at the other end of the hawser upon a receding swell taking her the other way, and by the force of the sea parting the line.* However, I think we need not take up any time in that type of discussion here, because the testimony certainly will be admissible and it will be for the court to decide.

Mr. BELL. My point is *that there is no allegation of any extraordinary weather, or any peril of the sea, or any extraordinary sea, or anything of that kind.*

Mr. LILLICK. That was the part of it that was giving me concern, your Honor, the statement, now repeated by Mr. Bell, that we made no allegation that the loss was due to a peril of the sea. We did not call it a peril of the sea, but it was a loss that could only come from a *venture that was involved in a peril of the sea.*

The COURT. Mr. Bell's point was, I think, that the allegations of the petition practically amount to *an occurrence that ordinarily might*

> *be expected at sea* and, therefore, not a peril of the sea" (67-69).

The petition and the record show that the breakings of the bridle occurred during the short voyage from Point Reyes to San Francisco, during the day-time, and only about an hour and a half after the vessel left Point Reyes (Pet. 6). There is no allegation that there was any fog, and it is apparent from the record that there was none. The course of the vessel from the bell buoy at Point Reyes to the time of the accident was uniform: E by S½S, and during that time the ground swells were westerly (Cap. Kruger, 175), from the starboard quarter of the vessel (Cap. Kruger, 97, 98, 175). There was no sea breaking, she shipped no water, there was not even any spray, and she was absolutely dry (Cap. Kruger, 97, 104, 145).

> "The COURT. Q. Where was the wind?
> A. Very light northwester. It was right astern of us. There was just an *ordinary* heavy ground swell" (Cap. Kruger, 104).

The hawser connecting the "Three Sisters" with the bridle was a 7 inch *manila* line (Cap. Kruger, 73), *which did not break* (Haney, 258). The bridle, although a 5/6 inch or a 7/8 inch *steel* cable (Figari, 157, 158; Westman, 156; Davis, 179; Lingenfelter, 396) *broke in two separate places* (Petition, 6, 7; Cap. Kruger, 96). The legs of the bridle were each 35 feet long (Westman, 150). Petitioner offered *no* evidence to show where, on the bridle, the two breaks occurred (see Tr. 220), but claimants' un-

contradicted testimony shows that *one break* was *on one leg* near the thimble connecting the steel bridle to the manila rope, and the *other* break was on the other leg near the bitt on the barge (Haney, 258, 259; Reid, 371; see Petition 6, 7). Petitioner did not produce the *broken bridle, although no part of it or the thimble or swivel attached to it was lost when it broke* (Kruger, 145, 146; Haney, 259), nor did it offer any testimony as to its condition after it was broken, or of the nature of breaks. Claimants' witness described the break near the thimble as "a ragged break" (Haney, 259).

The bridle was part of the equipment of the "Three Sisters" (Davis, 183; Cap. Kruger, 91, 92, 76, 77, 80, 81, having been borrowed by her owner from Crowley Launch & Tugboat Co. through Healy-Tibbitts Co. (Horten, 128). It will be remembered that Paladini Co. chartered the barge from the Crowley Co. (Paladini, 227; Claimants' Ex. B, 469, 470). The hawser was affixed to the bridle at Point Reyes just before the voyage under consideration began, by the master of the "Three Sisters" and his deck-hand Anderson (Cap. Kruger, 77, 92). Bridle and hawser were then on the stern of the "Three Sisters" (Cap. Kruger, 77, 91; Carlsen, 313), and were passed by Anderson, the deck-hand of the "Three Sisters," from her to Urquhart and Reid, who were on the barge, and who slipped it over the bitts on the barge (Cap. Kruger, 91; Reid, 365, 366; Urquhart's Deposition, 49). The hawser was connected to the bridle by a thimble and

swivel, and there is no evidence that either of these appurtenances broke, or that the equipment on the "Three Sisters" or the barge to which bridle and hawser were fastened broke. None of them was produced at the trial. It would seem that the hawser was made fast to the mast of the "Three Sisters," although her master in one place says it was to her starboard bitt (Cap. Kruger, 90, 91).

The dimensions of the "Three Sisters" appear accurately in license (Petitioner's Ex., 3, 466) as length, 56.3, breadth, 15.6; depth, 6 feet. The dimensions of the barge do not seem to be shown by the record. She had a pile-driver, a donkey engine, her usual appurtenances, and some piling aboard of her.

The master of the "Three Sisters" *saw the bridle break twice,* but his only description of it or the position of the respective vessels at the time is the following:

> "Q. What was the first thing you know about anything happening?
>
> A. I was standing in the pilot house and Mr. Anderson, the deckhand, was alongside of me; he was at the wheel, and I was looking out of the window of the pilot house, just by the pilot house control, and *I seen the port side of the bridle break,* and so I put the boat neutral, *but the boat had so much force that the other side of the bridle broke.* That is all I seen of the accident. I think Scotty said somebody got hurt. I went back there and I seen Mr. Sauder and Mr. Carlson unconscious" (Cap. Kruger, 96).

There is not a word of evidence in the record to account for the *first* break of the bridle, *nor is it attempted to be accounted for* in the Petition or even in the statements of counsel (see quotations, supra). Moreover, while the Petition and statement of petitioner's proctor (see quotations supra), as to the second break, say that *after the first* break, the "Three Sisters" was "on the receding side of one of said ground swells" when the *second* break occurred, *even they do not attempt to fix the position of the barge at that time.* And the *evidence,* as is apparent from the above quoted testimony of the master, *does not fix the position of either the "Three Sisters" or the barge at the time of either break.* Nor did the petitioner even *attempt* to fix the position of *either* vessel at the time of *either* break, *proctors for petitioner not even putting a question to the master with respect thereto,* although he testified that he actually saw the bridle break the first time and the second time. Deckhand Anderson did not see the bridle break (Anderson, 168).

At the time of the breakings of the bridle Anderson, the deckhand on the "Three Sisters" was at her wheel, and her master was in the pilot house alongside of him (Cap. Kruger, 96). When the master saw the *port* side of the bridle break he put the vessel in neutral, but notwithstanding the strain placed upon the bridle by the engines of the towing vessel was so removed, the *starboard* leg of the bridle broke (Cap. Kruger, 96).

When the bridle broke the two injured men were playing cards with two other men, all being seated on the starboard side of the after deck of the "Three Sisters" three or four feet away from the towing hawser (Kruger, 101). Upon the breaking of the towline it whipped back and struck Carlsen and Sauder (Petition and Statement of Proctors, supra). The blow knocked both men unconscious. (Cap. Kruger, 96). They were injured on Friday, June 8; Carlsen did not recover consciousness until the next day (Carlsen, 335, 336), and Sauder did not recover consciousness for days later (Sauder, 463, 439). Sauder's skull was fractured, vertebrae in Carlsen's neck were dislocated, cord torn away from his skull and his jaw injured (Carlsen, 436).

Beyond question the facts present as perfect a case for the application of the doctrine of *res ipsa loquitur* as can be imagined. The weather conditions obtaining at the time are summarized in the hypothetical question put by Mr. Lingenfelter to his witness Mohr:

> "The time was on the afternoon of June 8, 1923. The weather was fair; the wind was light northwesterly; the sea was smooth except for westerly ground swells *of the kind usually encountered in those waters at that time of the year*" (Mr. Lingenfelter, 396).

And yet the *steel* bridle broke in *two* separate places, one on *each* leg, though the single *manila* hawser which bore the *entire* strain of the tow remained unbroken, as did the fixture on the "Three

Sisters" to which it was made fast, and the bitts on the barge to which the bridle was attached.

From these facts, concerning which there is no dispute in the record, it must be apparent how well founded are Assignments of Error IX, X, XI, XIII, XIV, XV, XVI and XVII (483-484). There is *not only no evidence* supporting the statement in the District Court's opinion that the vessel "encountered a *very heavy* ground swell" (473), *but the petitioner's own evidence* shows that only the *ordinary* ground swell usually encountered in the waters in question was encountered. If, as the opinion further states, "the evidence satisfactorily shows that the real cause of the accident was these ground swells" (473), it *also thereby* shows that the two breakings of the steel bridle and the consequent injury to claimants *were not due to inevitable accident, but to the defective, insufficient and unseaworthy condition of such bridle and/or the negligent operation of the tow.* Moreover, the evidence does not show that the cause of either of the breakings "was these ground swells." *There is not a word of evidence,* as has been demonstrated, supporting the statement in the opinion that "the evidence shows that owing to the ground swells, the 'Three Sisters' was lifted on the crest of the swell at the same time the barge went down into the trough, thereby causing an unusual strain upon the cable" (474). It has been shown above that *not even the allegations of the petition nor the opening statement of petitioner's counsel, much less the evidence, attempt to*

account for either the first or the second break in this or any other manner. Moreover, even *if* the breaks were caused in the manner erroneously stated in the opinion, it would but prove that they were *not due to the inevitable accident,* but to the defective, insufficient and unseaworthy condition of the bridle, or the negligent operation of the two. The conclusion expressed in the opinion that "the evidence is convincing that the accident was either an inevitable one, or else that it was due to the ground swells" (474) *cannot support a decree for petitioner,* and therefore it is for this court to consider the whole case and come to *its own determination,* just as it did in the remarkably similar instance of *The Fullerton,* where it said, in reversing the lower court's decree which held a collision due to inevitable accident:

> "In so disposing of the allegations in the libel against the appellee, the court omitted to find facts which were material to the issues and which were proven by the evidence, and the case comes here for review upon the facts, so far as they concern the conduct of the officers in command of the Transit, *unaffected by any finding of fact of the court below* (Citing cases)."
>
> Gilbert, J., in *The Fullerton,* 211 Fed. at 835.

In the case at bar the court *first found facts unsupported by and contrary to the evidence,* and then reached a conclusion which would be untenable and indecisive of the case *even had the facts found been supported by the evidence.*

Some of the numerous authorities illustrative of the law of *res ipsa loquitur* and inevitable accident will now be noted. With the above facts in mind, the application of them will be self evident. It will be appreciated that such authorities clearly show that the doctrine is not limited to cases where contractual obligations exist, *but is peculiarly applicable to pure tort cases.* It would therefore apply *even* had the injured men not been passengers on the "Three Sisters," though they plainly were passengers. That they were not trespassers, but were aboard at the express and implied invitation of the master of the vessel, petitioner, at the least, must admit. It will be noted in the following authorities that vessels must even anticipate the occurrence of storms, and cannot assume the continued existence of cloudless skies, windless seas, *or that the swelling pulse of the ocean will un-naturally pause.* Even had petitioner offered any evidence to show the respective positions of the two vessels when either break occurred (and, as shown above, they offered *none*) so that one was on some side of some ground swell and the other on some side of another, the case *res ipsa loquitur* would be just as conclusive, because any positions of the two vessels with respect to each other *were natural and to be expected.*

(a") The Law.

> "The plaintiff was injured by the explosion of a steam boiler which was being used by the defendant to propel a vessel chartered by the

defendant to others to be used for the transportation of passengers and freight."

Rose v. Stephens Transp. Co., 11 Fed. at 438, (Cir. Ct. S. C. N. Y.).

"It is contended, however, that it was error to instruct the jury that they might infer such negligence from the fact of the explosion; and it is argued that such a presumption only obtains when the defendant is under a contract obligation to the plaintiff, as in the case of a common carrier or bailee. Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or in reason for any such limitation of the rule of evidence. *The presumption originates from the nature of the act, not from the nature of the relations between the parties. It is indulged as a legitimate inference whenever the occurrence is such as, in the ordinary course of things, does not take place when proper care is exercised, and is one for which the defendant is responsible.* It will be sufficient to cite two cases in illustration of the rule, without referring to other authorities." (Here the court cited *Scott v. London etc. Dock Co.,* 3 Hurl. & C. 596, in which plaintiff was injured as he was passing defendant's warehouse by bags of sugar falling from a crane by which they were being lowered to the ground. Also *Mullen v. St. John,* 57 N. Y. 567, where plaintiff, who was upon a street sidewalk, was injured by the fall of defendant's unoccupied building.) (Ib. at 439).

"In the present case the boiler which exploded was in the control of the employes of the defendant. As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this

boiler was not in a safe condition, or was not properly managed, was justifiable, and the instructions to the jury were correct"(Ib. at 439).

In the limitation proceedings to which claimants' proctors referred in their opening statement (67) the crank pin of a tug boat broke and her tow was lost on the rocks. The petitioner asserted *inevitable accident.* The Circuit Court of Appeals said:

> "At the time of the disaster the tug, with a tow quite usual for her, in the center of a favorable tide, carrying 115 pounds, but diminished by proceeding at half stroke, broke this crank pin. *Unless caused by inevitable accident, it is plain that the crank pin was insufficient and the tug unseaworthy.* The owner says it was caused by the propeller striking a submerged log. This is pure conjecture, *there being not the least affirmative evidence of it,* and we reject the explanation as improbable."
>
> *In re Reichert Towing Line,* 251 Fed. at 216 (C. C. A. 2.)
>
> "If conjecture is to be resorted to at all, we think it would be much more profitable the shaft had got out of alignment. However, *even in tort cases, where there is no contractual liability, one relying upon inevitable accident as a defense must either point out the precise cause, and show that he is in no way negligent in connection with it, or he must show all possible causes, and that he is not in fault in connection with any one of them.* The Merchant Prince (1892) Prob. Div. 188; The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552; The Lackawanna, 210 Fed. 262, 127 C. C. A. 80; The J. Rich. Steers, 228 Fed. 319, 142 C. C. A. 611.

The presumption of fault the Reichert Company has not overcome, and therefore it must be held liable for negligence in the limitation proceeding, and liable primarily because of the unseaworthiness of its tug in the subsequent suit brought by the owner of the Mathilde R" (Ib. at 217).

"CHARGE TO THE JURY—The owners of a towboat are not liable, as common carriers, for the safety of the boats and their contents which they undertake to tow. In the performance of the duty, they are bound to exercise ordinary care and skill in directing their movements, and are liable if the accident arose from want of such skill.

The fastenings were provided by the towboat, and it was the duty of the defendant to see that they were sufficient for the purpose, proper for securing the boats towed, under all the ordinary risks of the navigator. *Their breaking is prima facie evidence of their insufficiency, and the defendant is liable, unless he has satisfied you that they broke by reason of some cause other than their own defects."*

Leech v. Owner of Steamboat Miner, 1 Philadelphia Reports 144; 8 Leg. Int. 11.

In a limitation proceeding for the loss of a barge without motive power, used to transport excursions on New York harbor and adjacent waters, *in a sudden, violent thunder storm* Judge Benedict said:

"No doubt there are winds that nothing can withstand, and against which the owners of such vessels cannot be expected to be prepared; but my conclusion is that the wind that struck this barge, *while violent, did not exceed in violence any that might be reasonably expected in these*

waters. A vessel not strong enough to endure in safety such a wind as this barge encountered is, in my opinion, unseaworthy, and the injuries done to her passengers must be held to have arisen from the unfit and unseaworthy condition of the barge."

In re Myers Excursion & Nav. Co., 57 Fed. at 242, (D. C. E. D. N. Y.).

Affirmed: *The Republic,* 61 Fed. Rep. 109, (C. C. A. 2).

Libelant boarded a steamer, learned that he must pay an extra fare to stop at his destination, which was off the steamer's regular route, and declined to do so, but did not change his purpose of taking passage. Judge Hanford, after holding that he was nevertheless a passenger, said:

"The steamer has a stairway leading from the foreward part of her main deck to her cabin deck, and, immediately after going on board, the libelant was upon said stairway, going either from the main deck to the cabin or in the opposite direction, and while he was there the steamer's masthead light, a lantern weighing between 9 and 10 pounds, was being hoisted to its position on the mast, and, *by the breaking of the halyard,* it fell, striking the libelant on the scapula of his left shoulder. * * * *The testimony fails to disclose the cause of the accident, but it could not have happened if the halyard and appliances for suspending the light had been sound, of sufficient strength and proper construction, and there had been no negligence on the part of the officers and men employed on the steamer in the perfor-

mance of their duties in connection with said light."

The Wasco, 53 Fed. at 547 (N. D. Wash.);

City of Kensington, 77 Fed. 655 (N. D. Wash.);

The Crescent City, 1925 A. M. C. 40 (C. C. A. 9).

"It was the duty of the tug, as the captains of the canal-boats had no voice in making up the tow, to see that it was properly constructed, *and that the lines were sufficient and securely fastened.* This was an equal duty, whether she furnished the lines to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together, and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault. *The parting of the line connecting the boat in the rear on the port side with the fleet,* was the commencement of the difficulty that led to this accident. In the effort to recover this boat, the consequences followed which produced the collision. If it was good seamanship on the part of the captain of the tug to back in such an emergency, he was required, before undertaking it, *at least to know that his bridle line would hold."*

Steam Tug Quickstep, 9 Wall 665; 19 L. Ed. at 767;

The C. W. Mills, 241 Fed. at 205, 206.

"The sea was heavy and the motion of the boats in the trough of the sea abundant to account for the sinking of the two boats which were lost, of which the libelant's boat was one.

I cannot doubt, upon the evidence, that, *if the hawser had not parted,* all the boats would have reached New Haven in safety, and that the parting of the hawser was the cause of the disaster. *This breaking of her hawser casts upon the tug the responsibility of the loss which resulted therefrom.* The transportation of tows of loaded canal-boats in the waters of the Long Island Sound involves much danger and *corresponding responsibility.* The tow-boats engaged in that business must be competent in power *and equipped with hawsers of sufficient strength to hold their tows in any weather ordinarily to be anticipated in that navigation.* The canal-boats are frail, and their safety in any sea-way is dependent upon the union of many boats in one compact mass, which when kept moving together, properly lashed, experience has shown to be able to withstand all weather necessarily experienced in navigating the Sound. This union, which is the source of their strength, is maintained by the power of the tug applied by means of the hawsers, and, *in any case of disaster arising from a failure of the hawser, it is incumbent upon the tug to show plainly that its failure arose from no defect in quality or size.* In this case the hawser which parted was an *old* hawser of short length, which was eked out by bending on to it part of a 4-inch stern line. In order to hasten the tow when near New Haven, to the power of the Francis King was added the power of the Gamecock. To that strain the smaller line proved unequal, and it parted, whereby the tow was at once thrown out of shape in a chopping sea. This parting of the port hawser was the real cause of the loss of the libelant's boat, and for its failure the Francis King is responsible. * * * * I am forced to the conclusion that it was not through any fault of the libelant, *nor by reason of any unforseen and inevitable*

peril of the seas, that his boat was sunk, but because the tug-boat undertook to conduct the two with a hawser insufficient for the purpose to which it was applied."

Benedict, J.: The Francis King, 9 Fed. Cas. #5042, at pp. 690, 691 (C. D. N. Y.).

"The conclusion reached by the court upon the whole case is:

First. That the tug Nettie was not equipped, at the time of the parting of the towline, with a sufficient and suitable hawser for the purpose of performing the work in hand, as was required of her, and for loss arising thereby she is liable. The Britannia (D. C.) 148 Fed. 495, 499, and cases cited. Considerable evidence was introduced by the respondent tending to show the exercise of proper care in the selection of this hawser; *but after giving much consideration to the same, the fact that it was a spliced hawser, and parted at least twice when its strength was tested, satisfies the court that it was not a suitable and safe appliance for the service required, taking into account especially the dangers liable to, and which did, arise from encountering heavy seas in Pamlico Sound."*

The Nettie, 170 Fed. at 527, 528 (E. D. Va.);

Tugs Osceola & Hercules, 1924 A. M. C. 1030 (D. C. S. D. N. Y.) (Breaking towing hawser);

Scow H. S. Hayward, 1924 A. M. C. 242 (D. C. E. D. N. Y.) (Deficient tow-line breaking);

Barge Mamie Nelson, 1924 A. M. C. 713; 296 Fed. 107 (C. C. A. 2). (Deficient tow-line breaking).

"Second. *The tug failed to furnish a safe and suitable hawser* to perform her contract of towage, which in part caused the accident, and in consequence of which she should share in the loss sustained. It may be conceded that the tug ordinarily would not be responsible for the parting of its hawser, under the circumstances and conditions of this accident, provided due care and caution had been exercised in procuring a suitable one, which had been properly preserved and seasonably inspected; and that the tug owner should not be held liable for a hawser's breaking merely because of the happening of the event. *But when the fact is taken into account that upon this same voyage, in good weather, and smooth sea, this hawser had twice before parted, the court cannot say that the defective condition of the hawser did not cause it to part, and certainly that a sound hawser might not have averted such an occurrence.*"

The Britannia, 148 Fed. at 498 (E. D. Va.).

"The law imposed upon her the duty of making up the tow and seeing that proper lines were provided, either by the tow or herself. If those on the scow were unfit for the service, others should have been provided before entering upon the voyage, and for loss arising from such defective hawser, whether the same were furnished by the tow or tug, the latter is liable. These are obligations imposed upon and assumed by the tug from the nature of the employment, and for damages for her negligence in this respect she should be held responsible. The Quickstep, 76 U. S. (9 Wall.) 665, 671, 19 L. Ed. 767; The Syracuse, 79 U. S. (12 Wall.) 171, 20 L. Ed. 382; The John G. Stevens, 170 U. S. 113, 125, 18 Sup. Ct. 544, 42 L. Ed. 969; The Somers N. Smith (D. C.) 120

Fed. 569, 576; The Emery Temple (D. C.) 122 Fed. 180; The W. G. Mason (C. C. A.) 142 Fed. 913, 918; The Oceanica (D. C.) 144 Fed. 301, 305" (Ib. at 499).

"That a tow line properly secured will not slip off of the tow posts is a reasonable presumption, and evidence of damages resulting from the slipping of the tow line, unexplained, makes a prima facie case of negligence. The Quickstep, 9 Wall. 665, 19 L. Ed. 767; Cincinnati, etc. Ry Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; The Olympia, 61 Fed. 120, 9 C. C. A. 393; Memphis Electric Co. v. Letson, 135 Fed. 969, 68 C. C. A. 453; The Sweepstakes, Fed Cases, No. 13,687; The Lyndhurst (D. C.) 129 Fed. 843; Burr v. Knickerbocker Steam Towage Co., 132 Fed. 248, 65 C. C. A. 554."

The S. C. Schenk, 158 Fed. at 57 (C. C. A. 6).

In a case where the *towing hawser of a tug broke,* resulting in loss of her tow, the Circuit Court of Appeals for the Second Circuit said:

"We concur with Judge Hand in the finding that *the storm was not of an unusual or extraordinary character. One might expect to encounter such a storm in that part of Long Island Sound at any time.* We also concur in his conclusion that the Standford was not of sufficient power to undertake to haul such a tow as this through the Sound with the chance of meeting such a storm. *The event shows this quite clearly."*

The Charles B. Sandford, 204 Fed. 77, 78 (C. C. A. 2).

"4. In not properly fastening the tow line. If the charges of fault were to be determined

solely by the expert testimony as to the mode of fastening adopted, it would have to be decided that the line was properly fastened, as far as the mode of fastening is concerned. But the question raised goes beyond the mere mode of fastening. Conceding the mode to have been correct, the real question is, was it properly and securely fastened according to that mode? *Undoubtedly it was the duty of the tug to see that the line was securely fastened, no matter what mode of fastening was adopted, and so as to hold in all emergencies likely to happen, whether ordinary or extraordinary; and the fact that it did not so hold is the best evidence that the duty was not performed. I know of no safe rule other than to hold tugs responsible prima facie in all cases, for injuries resulting from the tow line slipping or giving way from its fastening upon the tug.*"

The Sweepstakes, 23 Fed. Cases, No. 13687, at pp. 542, 543 (D. C. Mich.).

"The petitioner urged that the barges were caused to break loose because the rise of the river was an extraordinary flood. This we cannot find to be the case. The river was high, *but not higher than it was likely to be, in the light of experience prior to that time.*"

Petition of Diamond Coal & Coke Co., 297 Fed. 238, at 241 (D. C. W. D. Pa.); Affirmed 297 Fed. 246; Cert. Den. 68 L. Ed. 721.

"While the burden of establishing negligence is primarily upon the plaintiffs, *when the fleet of barges went adrift the owner is presumptively negligent,* and liable to the injuries resulting. In other words, the burden shifts upon it. In The Louisiana, 70 U. S. (3 Wall.)

164-173 (18 L. Ed. 85), the Supreme Court said:

'The collision being caused by the Louisiana drifting from her moorings, she must be liable for the damages consequent thereon, *unless she can show affirmatively* that the drifting was the result of inevitable accident, or a vis major, which human skill and precaution, and a proper display of nautical skill could not have prevented.'"

Petition of Diamond Coal & Coke Co., 297 Fed. 242, at 244 (D. C. W. D. Pa.); Affirmed 297 Fed. 246; Cert. Den. 68 L. Ed. 721.

"The claimants have failed to prove that the breaking of the rudder was an inevitable accident. The onus of proof rested on them; the libelants having, in the first instance, established a prima facie case either of neglect or of want of seaworthiness.

The law laid down in The Merchant Prince (1892), Prob. Div. 188, 7 Aspinall's Reports (New Series) 208, leaves no doubt on this point. This was an action for damages, by collision, in which it appeared that the plaintiff's vessel was at anchor in broad daylight in the Mersey, when the defendants' steamer ran into her. The defense was that the steam steering gear of the defendants' vessel failed to act, in consequence of some latent defect, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of defendants, and that the resulting damage was caused by inevitable accident. The steam steering gear in question was good of its kind. It had never previously failed to act, and the cause of the defect in the machine or in its working could not have been dis-

covered by competent persons. Part of the gear, including some portion of the chain, running between the wheel and the rudder, had been recently renewed, and it was admitted that new chain was liable to stretch. It was also proved that, before the vessel left her anchorage and proceeded on her voyage, the whole of the gear had been tested and found in good order, and that the chain had been tightened as occasion required. It was held by the Court of Appeals, reversing the Admiralty Court, that the defendants were liable, as they had not discharged themselves of the burden cast upon them by the prima facie case. Lord Esher said (page 188):

> '*If he (the defendant) cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid?*'

Lord Justice Fry said (page 189):

> '*The burden rests on the defendants to show inevitable accident.* To sustain that the defendants must do one or other of two things. They must either show *what was the cause of the accident, and show that the result of that cause was inevitable;* or they must show *all the possible causes* one or other of which produced the effect, and must *further show with regard to every one of these possible causes that the result could not have been avoided.* Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident.'

The Circuit Court of Appeals of this circuit has cited and quoted with approval from The Merchant Prince, supra, in The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552, and again in The Bayonne, 213 Fed. 216, 129 C. C. A. 560, where it was said by Judge Ward, de-

livering the opinion of the court, that the conclusion of inevitable accident,

> *'should only be adopted if either the cause * * * is shown and that it was unavoidable, or else all possible causes must be shown to have been unavoidable.'*

If this is the law in collision and negligence cases, *there is equal, if not more, reason why it should obtain in the case of a towage contract, where there is an implied obligation of seaworthiness,* and where, as stated by Kennedy, L. J., in the Court of Appeal in The West Cock, (1911) Prob. Div. 208, on page 231, 12 Aspinall's Reports (N. S.) 57:

> 'The burden of proof * * * lies upon the tug owner to show that it was as reasonably fit and proper a tug for use as skill and care could make it.'

The court cannot, by approving a resort to mere conjecture as to the cause of the defect in the rudder, relax the important and salutary rule in respect of seaworthiness. The Edwin I. Morrison, 153 U. S. 215, 14 Sup. Ct. 823, 38 L. Ed. 688; The Alvena (D. C.) 74 Fed. 252, 255; The Phoenicia (D. C.) 90 Fed. 116, 119."

The Enterprise, 228 Fed. at 137, 138 (D. C. Conn.).

See also:

Great Lakes Co. v. Amer. Shipbuilding Co., 243 Fed. 852 (C. C. A. 6);

The Bertha F. Walker, 220 Fed. 667 (C. C. A. 2);

The Old Reliable, 262 Fed. 109 (C. C. A. 4).

"From the fact that a piece was found broken out of the tug's propeller it is argued that she must have struck a submerged log or other similar obstacle; *but there is no evidence*

on that point, and we cannot infer such an obstruction from the mere chipping of the propeller blade. Nor is there any evidence to show that a shock insufficient to materially injure the propeller should have broken a good shaft. We cannot concur with the finding of the court below that this case is an instance of inevitable accident. It is enough to refer to our judgment in Re Reichert Towing Line, 251 Fed. 214 (C. C. A.), decided since the decree appealed from was entered. The facts now before us are much less favorable to the tug than were those which we found insufficient in the decision just cited." * * * *"Here we infer negligence (i. e. unseaworthiness) in the tug from the unexplained breaking of her shaft."*

The Westchester, 254 Fed. at 577, 578 (C. C. A. 2).

See:

In Re Reichert Towing Co., supra.

"*The proof offered by the tugs did not afford any explanation of the causes of the disaster,* aside from the alleged disregard of orders by the tow. *No unforseen difficulties were encountered, and no obstacle which the tugs were not bound to anticipate.* The case is one where the stranding of the steamer created a presumption of negligence. The Webb, 14 Wall. 406, 20 L. Ed. 744; The Kalikaska, 107 Fed. 959, 17 C. C. A. 100."

The W. G. Mason, 142 Fed. at 915 (C. C. A. 2).

See also:

The Allegheny, 252 Fed. 8 (C. C. A. 3).

"The respondent having relied upon an inevitable accident, it was incumbent upon it to show *what the cause of the grounding was, and*

that the result of the cause was inevitable, in the sense that it occurred in spite of everything that nautical skill, care, and precaution could do (Mabey v. Atkins, 14 Wall. 204, 20 L. Ed. 881; The Morning Light, 2 Wall. 550; Union Steamship Co. v. N. Y. & Va. Steamship Co., 24 How. 307, 16 L. Ed. 699), or to show *all possible causes and as to all such that the result was inevitable* in the sense before mentioned (The Merchant Prince, L. R. Probate Division 179; The Olympia, 61 Fed. 120, 9 C. C. A. 293 (C. C. A. 6th Cir.); The Bayonne, 213 Fed. 216, 129 C. C. A. 560 (C. C. A. 2nd Cir.))."

Gilchrist Tr. Co. v. Great Lakes Towing Co., 237 Fed. at 443 (D. C. N. J.).

"The following principles of law are well settled: * * * That, although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found, *without the ship having encountered a peril sufficient to account for it, the presumption is that she was unseaworthy when she sailed.*"

Pacific Coast SS. Co. v. Bancroft Whitney Co., 94 Fed. 196 (C. C. A. 9).

"There must be responsibility lodged somewhere, and the corporation, in simple justice, must be held to as strict and full accountability as individuals. It not infrequently transpires that a vessel, after entering upon her voyage or engaging in the service for which she is dispatched, becomes unseaworthy, *and damage ensues, without any apparent cause from stress of weather or collision in any way,* or undue or negligent abuse in handling and navigating her, *and in every such case the presumption obtains that she was unseaworthy at the time of entering upon her service.* How else could her condition be accounted for? In the case of The

Arctic Bird, (D. C.) 109 Fed. 167, the barge, the subject of libel, was taken in tow, having cargo on board, and, having proceeded for six hours on her voyage, sank without receiving injury from any known source, *and without encountering strong wind or rough sea. The court held it was to be presumed that the barge was unseaworthy at the outset; otherwise, there was no cause or way to account for her action in failing to perform the functions for which she was dispatched.* The court quotes, as authoritative, from Dupont De Nemours v. Vance, 19 How. 162, 15 L. Ed. 584, as follows:

> 'As to what constitutes seaworthiness, it has been uniformly held that if a vessel springs a leak, and founders, soon after starting upon her voyage, *without having encountered any storm or other peril to which the leak can be attributed, the presumption is that she was unseaworthy when she sailed.'*

And also from Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012:

> 'If a defect without any apparent cause be developed, it is to be presumed it existed when the service began.' "

Oregon Lumber Co. v. Portland & Asiatic SS. Co., 162 Fed. at 920-921 (D. C. Ore.).

The Arctic Bird, 109 Fed. 167 (D. C. Cal., DeHaven, J.).

A passenger was injured by a steamer running into a dock through the refusal of her port reversing engine to act. The court said:

> *"It was not for the plaintiffs to furnish a theory that would account for the accident, but for the defendant to show that it came from*

something which could not reasonably have been prevented. Even if there was nothing to contradict the evidence produced by the company to show that it had performed its duty, it would still have been for the jury to say whether they were satisfied with it; and there can be no just cause for complaint if they have rejected some of the facts testified to, and given a significance to others which fails to exonerate the company, provided only that it is consistent and warranted."

Walker v. Wilmington Steamboat Co., 117 Fed., at 786;

Director General v. Frasse, 1924 A. M. C. 354 (stevedore damaging barge).

"The facts upon which liability depends are simple in the extreme. The Rambler's boiler blew up, although of good, if not superior, make, shortly after satisfactory inspection, and while in charge of duly licensed men. *By the contention of the petitioner, no reason is shown for the explosion. We have no doubt that these facts present a clear case for applying the rule commonly spoken of as that of 'res ipsa loquitur'.* Of the nature and effect of this rule we have nothing to add to what we said in Central Railroad v. Peluso, 286 Fed. 661. But since this is a case of a boiler explosion on shipboard, we refer to the opinion of Wallace, J., in Rose v. Stevens etc. Co., (C. C.) 11 Fed. 438. There a jury was instructed that they might infer negligence from the fact of the explosion; i. e., the explosion spoke for itself."

The Rambler, 290 Fed. at 792.

In accord (exploding boilers): DeHaven, D. J., *Re Cal. Nav. & Imp. Co.,* 110 Fed. at 672 (N. D. Cal.).

The Omar D. Conger, 1 (2nd) Fed. 732; 1924 A. M. C. 1576.

A steamer struck, with considerable force, a wharf at which she was landing, and injured plaintiff, who was standing thereon. The Supreme Court said, in sustaining an instruction to the jury:

> "The whole effect of the instruction in question, as applied to the case before the jury, was that, *if the steamboat, on a calm day and in smooth water, was thrown with such force against a wharf properly built, as to tear up some of the planks of the flooring, this would be prima facie evidence of negligence on the part of the defendant's agents in making the landing, unless upon the whole evidence in the case this prima facie evidence was rebutted.* As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case *was prima facie, and, if unexplained, sufficient evidence of negligence on their part,* and the jury might properly be so instructed."
>
> *Inland and Seaboard Coasting Co. v. Tolson,* 139 U. S. 555; 35 L. Ed. at 271.

See also:

Gleeson v. Va. Midland Ry. Co., 140 U. S. 442; 35 L. Ed. 462.

> "He (the carrier) is responsible for injuries received by passengers in the course of their

transportation which might have been avoided or guarded against by the exercise upon his part *of extraordinary vigilence, aided by the highest skill. And this caution and vigilence must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages.*"

Penn. Co. v. Roy, 102 U. S. 456; 26 L. Ed. at 144.

Accord:

Northern Commercial Co. v. Nestor, 138 Fed. 386 (C. C. A. 9th).

(b) The Evidence Does Not Rebut, But Confirms The Case Res Ipsa Loquitur.

The evidence offered by petitioner, even without regard to that offered by claimants, so far from *overcoming* the case *res ipsa loquitur, absolutely confirms and seals it.*

The master of the "Three Sisters" found the bridle aboard her when he took the barge *up* to Point Reyes a month before the *down* trip on which claimants were injured, and didn't know anything about where it came from (Cap. Kruger, 76, 77). It appears the bridle remained on the "Three Sisters" and *was used for other towing* between the

up and down trips (Cap. Kruger, 81, 105, 112, 113). When not in use the master said that it was in the hold of the "Three Sisters" (Cap. Kruger, 81).

Asked if the swivel was working when made fast to the barge for the down trip *on which the men were injured,* the master said:

"I could not say, *for I didn't look at it*" (Cap. Kruger, 92, 112). Before he made the up trip he made no investigation of the swivel and didn't know whether it would work (Cap. Kruger, 112).

> "Q. And you don't know right now whether or not at that time or at any subsequent time the swivel was rusted so bad that it would not turn, do you?
> A. *No sir*" (112).

His testimony on direct examination that "it must have been working" (78) is obviously not from actual memory. *It is the conclusion of a naturally biased witness based upon imagination and inference.* This is confirmed by the *deposition* of Urquhart, an experienced ship rigger (Carlsen 431) who helped put the bridle over the barge's bitts at Point Reyes on the voyage on which the men were hurt (Dep. 49) as to its condition *at that time:*

> "A. The wire was quite rusty as if it had been used for a long time or been lying around like it was old. The swivel in the center where the tow line shackled into was not in good working order.
> Q. What was wrong with the swivel?
> A. *It was rusted fast or frozen so that it would not turn.*

Q. Have you had any experience in the use of ropes and bridles during your occupation as pile driver?

A. *I have been a ship rigger and certainly made lots of bridles and lots of wire in my time.*

Q. From your observation, Mr. Urquhart, was or was not this bridle a fit and proper bridle to be used in the condition that it was?

A. *It was not to my idea.*

Q. What effect, if any, Mr. Urquhart, has the fact that the swivel in the bridle being frozen or rusted have upon the likelihood of this bridle to break when being used for towing?

A. When the tow line becomes taut the turns will run out of the rope and the swivel being frozen and rusted solid the turns would have to go into the wire as there is no place else for them to go; so the wire would lay up one part on the other like a rope.

Q. And would that condition have a tendency to cause the bridle to snap or break?

A. *It certainly would;* chafing up like that, the laying and unlaying would wear it out in a short time and weaken it so as to cause it to break" (Urquhart Dep., 46, 47).

And as to its condition a month earlier, at the beginning of the *up trip:*

"Q. When did you *first* observe the condition of the bridle upon the barge?

A. The *first* time when it was put on the barge to be towed to Point Reyes. The barge left Pier 46" (Dep. 48).

"Q. And you would say that at the *first* time that you examined this bridle that *it was frozen in the swivel?*

A. *It was.*

Q. Rusted fast?

A. At the time we put it on at Pier 46 the two parts of the bridle spliced into the swivel was *twisted up between two and three feet.*

Q. Did I understand you to say that at the time you *first* observed this bridle at Pier 46 that the swivel of the bridle was *so rusted and frozen that the swivel would not turn?*

A. *Yes.*

Q. That was the condition of the bridle at that time?

A. That was the condition of the bridle and before putting the eyes over the bitt we took the turns out of the wire so that both parts of the bridle were clear.

Q. But the swivel at that time was frozen?

A. *It was''* (Urquhart Dep., Cross-Exam., 48, 49).

"Q. Was the entire bridle in a rusted condition on this occasion when you first observed it?

A. It was some rusted throughout.

Q. Did you observe any oil on the bridle?

A. No.

Q. Did you observe any oil upon the swivel of the bridle?

A. *Not a bit.*

Q. Did you ever *again* observe the bridle after this observation of it which you have *just testified to?*

A. I helped put the bridle on the barge to be towed *from* Point Reyes *to* San Francisco'' (Urquhart Dep., Cross-Exam., 49).

He plainly testified on direct examination that the swivel was frozen and the cable rusty when the voyage *from Point Reyes* began (Dep. 46, 47, quoted supra). In cross-examination petitioner's proctors asked him when he *first* observed the condition of the bridle, and he answered what they asked him.

Proctors for petitioner, for reasons of their own, did not pursue their cross-examination *as to the condition at Point Reyes* at the commencement of the *down* trip, further than to ask the above quoted question:

> "Q. Did you ever *again* observe the bridle *after* this observation of it which you have *just* testified to?
>
> A. I helped put the bridle on the barge to be towed *from* Point Reyes *to* San Francisco" (Urquhart Dep., Cross-Exam., 49 supra).

Claimants' witness Reid, *who placed the bridle over one* bitt of the barge at the beginning of the voyage down, testified that the bridle looked rusty and *some of its strands were broken* (Reid, 365, 366, 371, 372, 373, 380, 381; Figari, 249). It is respectfully submitted that the Court was under some misapprehension in its remark on pages 380, 381 of the record, for the *petitioner offered no evidence at all* to the points on the bridle where the two breaks occurred, and claimants' testimony on the point consisted of that of Haney and Reid, who are *entirely consistent* that one break was near one of the large bitts and the other:

> "A. About a foot or so from the swivel, there" (Reid, 372, 373).
>
> "A. It broke back of the splice" (Haney, 258, 259).

The master of the "Three Sisters" not only made no inspection at the beginning of the *down trip,* as pointed out above, but he made none at the beginning of the *up trip:*

"Q. And you didn't make any investigation at that time of the swivel, did you?

A. *No sir.*

Q. You didn't know whether or not that swivel would work, did you?

A. *No sir.*

Q. And you don't know right now whether of not at that time or any subsequent time that swivel was rusted *so bad that it would not turn,* do you?

A. *No sir.*

Q. Captain Kruger, will you swear now you examined the bolt of the swivel you used, and that you know it was galvanized?

A. *I didn't examine it"* (Cap. Kruger, 112, 281).

Nor did he make any inspection of it *even after the bridle had broken in two places:*

"The COURT. Q. Did you look at the bridle when you hauled it aboard?

A. *No,* Judge" (Cap. Kruger, 146).

The single deck hand of the "Three Sisters" made no inspection of the swivel:

"Q. At that time did you notice whether the swivel was turning freely in its socket?

A. *No, I didn't notice the swivel at all"* (Anderson, 166).

Thus the testimony shows without contradiction that neither the master nor the single deck hand *ever examined the swivel,* and it does not show that either of them *ever examined the bridle,* either before or after the bridle broke in two places. And yet, *petitioner's own expert* Mohr testified:

"Q. Before you make a tow, Captain, you always examine your swivel, don't you, *to see whether or not it is in working order?*

A. *Yes.*

Q. You would not use a swivel which was frozen or rusted up fast, would you?

A. *A swivel that is frozen or rusted up, I always try to put it back in function"* (Mohr 399, 400).

And the master himself admitted that in towing with a bridle a swivel is necessary—and, of course, that means a *working* swivel:

"Yes, if you have a bridle *you have to have a swivel"* (Cap. Kruger, 119).

The situation cannot be more aptly summarized than in the words of Mayer, Circuit Judge:

"We are satisfied from the testimony that the Mercer was not guilty of any fault in her navigation in or about the Baltimore & Ohio bridge, *but that the approximate cause of the accident was the rotten condition of the Mamie Nelson's lines. It is plain that these lines for practical purposes were useless, when subjected to a strain of any consequence.*

There is no evidence that the master or any one else on the Mercer made either inspection or inquiry concerning the lines when the tow was made up or at any time thereafter. The pilot was not called, nor does the record disclose any explanation of his absence.

It must be concluded from the testimony that the Mercer thus *started off with this tow without even the slightest investigation by her master or pilot as to the lines of the barge Mamie Nelson,* and we think the testimony shows that even a slight investigation would have dis-

closed the unfit condition of the lines. Indeed, Weber testified that after the occurrence, he told the captain of the Mamie Nelson 'that his lines were rotten and were not fit to tow with,' and that the captain answered, 'They were the best he had; that the boss would not give him any better.'

In these circumstances, the Director General is liable as well as the Central Co. The Quickstep, 9 Wall. 665, 19 L. Ed. 767.

In The Sunnyside, 251 Fed. 271, 163 C. C. A. 427, the facts are quite different from those in the case at bar. *In that case, the lines were examined,* and the court held that the examination was reasonable, but the defect was not readily discoverable because the lines were unsound at the core."

The Mamie Nelson (Robitzek & Davis), 296 Fed. 107, at 108, 109; 1924 A. M. C. 713 C. C. A. 2);

Scow H. S. Hayward, 1924 A. M. C. 242 (D. C. N. Y.);

Tugs Osceola & Hercules, 1924 A. M. C. 1030 (D. C. N. Y.).

Mr. Figari, *the General Superintendent of Crowley Launch and Tugboat Co.* (156), of whom Mr. Brown, of Healy Tibbitts Construction Co., borrowed the bridle for the Paladini Company, (174, 175) did not inspect the swivel or the bridle before they were delivered to Paladini:

"Q. You don't know anything now of your own knowledge about this particular swivel that you let Mr. Brown have, do you?

A. *No.* The only thing I know is that it was used on the boat.

Q. And you have never seen that swivel since, have you?

A. *I have not seen it since"* (Figari, 160).

"Q. And you did not do anything to that swivel before you put it on the dock before it was delivered to the barge, did you?

A. I got the *captain of our tug* to take it off his boat, cut the manila line out and just throw the bridle on the dock.

Q. You didn't touch that bridle at all yourself, you had the captain throw it on the dock?

A. I told him to take it off. *I just looked at it.* I told him to cut the line and put it on the dock" (Figari, 160, 248, 249).

Mr. Figari also testified:

"Q. Who inspects your (Crowley L. & L. Co.) equipment?

A. The *captains* of the tugs inspect their own equipment" (Figari, 160, 248).

It is significant that the *captain of the tug* from which the bridle was taken *was not called* to testify as to the condition of the bridle or swivel, their age, use to which they had been subjected, etc.

It is also most significant that Mr. Figari also testified that the company *of which he was the General Superintendent* and from which the bridle in question was borrowed, *did no outside towing:*

"We don't do any outside towing; most all our towing is in the bay. We have towed a barge like that up to Point Reyes, and we used the same kind of a bridle. We do very little outside towing. *If we do go outside it may be just outside the Gate; and we might have a barge of rubbish, or something like that to tow out. We do very little outside towing, it is all*

in the bay" (Figari, 163; Heidelberg, 426; Carlsen, 301).

Mr. Carlton, one-time Port Engineer for the petitioner (though to what time neither he, Davis, who succeeded him, nor Paladini would say), says he *saw* the bridle a month before, "the morning of the tow" *to* Point Reyes, but did not examine it:

"Q. Did you see the bridle that was used by the 'Three Sisters' to tow the barge up to Point Reyes?

A. The *only* time I saw the bridle was *on the barge* at Pier 23, the next morning. *I never went on board, and* I had nothing to do with it" (Carlton, Direct Exam., 354).

"Q. Did you examine the swivel that day carefully?

A. *I just looked at it.*

Q. How far away from it were you when you looked at it?

A. About two feet" (Carlton, 358).

His testimony on further direct examination that the swivel was not frozen and was turning (355) is but another plain example of *imagination and inference turned into recollection by a naturally biased witness* protecting himself against imputation of negligence in his duty.

It is not contended that petitioner's witnesses (Horten, 127-136; Westman, 151, 162; A. Paladini, 231; Crowley, 245, 246, or Mohr, 392-419) made any examination of the bridle or swivel, or that Brown, (175, 176), or Del Savaro, (131, 239, 240), did so.

It remains only to examine the testimony of Mr. Davis, (176-222), who says that he was Port Engineer for the petitioner, though, as above remarked, neither he nor his predecessor nor Mr. A. Paladini disclosed when he succeeded Carlton (Davis, 176-177, 186, 191, 192, 197, 198, 205, 212, 220; Carlton, 356, 357, 360, 361, 362; A. Paladini, 235, 225, 226; Kruger, 70, 74, 111). It is respectfully submitted that *the testimony of Mr. Davis himself shows that he never examined either the bridle or swivel.* No insinuation is necessarily cast against the honesty of a biased witness by making some allowance for error or defect in his memory. We ask the court to carefully read the testimony of Mr. Davis upon this point, bearing in mind the statement of Mr. Justice Field:

> "Our memories are easy and ofttimes unconscious slaves to our wills".
>
> *United States v. Flint,* 25 Fed. Cas. No. 15,121, at page 1111.

Judge Finch said:

> *"The interest of a perfectly credible and innocent witness may, and often does, color his recollection and mold and modify his statements, sometimes even insensibly to himself".*
>
> *Hunter v. Wetsell,* 84 N. Y. 549, at 556.

Bearing in mind, also, the natural bias in his own interest, the language of District Judge Kane is peculiarly applicable to his testimony:

> *"It could scarcely be expected that the look-out man should attest his own want of viligence, and it is not to make a serious imputation against him to admit that he cannot now recall with unbiased accuracy the collateral incidents of a catastrophe to which he was at least a painfully interested witness, if not a responsible party".*
>
> *Sanderson v. The Columbus,* 21 Fed. Cas. No. 12,299.

We respectfully submit that Mr. Davis did not testify from any actual memory which he had of examining the bridle or the swivel, but from his imagination and inference turned into recollection. *We ask the court to read his testimony with this in mind.* The psychology of the matter was well expressed by Sir John Romilly:

> "In the examination of the evidence of witnesses great difficulties of various sorts arise, and dangers with which the court has constantly to deal in examining the evidence of witnesses who are perfectly honest and give their evidence perfectly bona fide, *arises from their turning inference into recollection".*
>
> *Pierce v. Brady,* 23 Beav. 64, 70.

> "It is a very common thing for an honest witness to confuse his recollection of what he actually observed, with what he has persuaded himself to have happened, from impressions and conclusions not really drawn from his own actual knowledge".
>
> *Matter of Wool,* 36 Mich. 299, 302.

It seems perfectly obvious that Davis had no recollection of having made any examination of the bridle, the swivel or even the rope hawser, *but merely inferred from the fact that he was supposed to examine petitioner's vessels that he must have made an examination in the particular instance.* His very language shows this, and if such an inference could ever be relevant or competent, it could not be so or have any weight in this instance, because *Davis had not been petitioner's port engineer long enough* to have established a custom of making such examinations. Attention must again be directed to the unsatisfactory state in which petitioner left the record with respect to when Davis succeeded Carlton as petitioner's port engineer, which cannot but confirm the fact that the obligation of examining the bridle and swivel *fell between the two and was never performed by either.* Though we request the court to read *the whole* of the testimony of Davis, we quote from it as follows, the more clearly to demonstrate that he had no recollection of making any examination.

It is to be noted that Mr. Davis admitted that it was his duty to inspect the tow line, showing his biased interest:

> "Q. Whose duty was it to see that this tow line was good and sufficient?
>
> A. *My duty*" (183).
>
> "Q. Mr. Davis, do you now say you remember having examined this bridle in June of

1923, this particular bridle that was used in towing Barge 61 back from Point Reyes?

A. I examined all equipment" (189).

"Q. What did you do in examining the bridle and swivel; just tell us what you did?

A. Well, *I can't remember that far back but I know I did examine it.*

Q. Yet you don't remember what day you examined it?

A. Exactly, personally, *no*" (190, 191).

"Q. Where did you find this swivel? Where was it when you examined it?

A. *I don't remember exactly*" (192).

"Q. What did you do with the swivel and the bridle after you got through examining them?

A. I didn't do anything with it.

Q. You must have done something with it. You either let it lay on the wharf, or you did something with it, didn't you, after you got through examining it? Have you answered the question?

A. *I don't remember*" (193).

"Q. What was the condition of that wire rope as to whether or not it was rusted?

A. Well, I don't think it was rusted, *because if it had been I would have noticed it*" (193, 194).

"Q. Was there any oil on the swivel?

A. *I don't remember.*

Q. You don't remember that, whether there was any oil on the swivel or not?

A. There *probably* wasn't.

Q. There probably wasn't; but you don't know now of your own knowledge. You don't know of your own knowledge that there was no oil on it?

A. *No.*

Q. You didn't put any oil on it, did you?

A. I did not.
Q. Wasn't that swivel some rusted?
A. *Probably* it was colored, but not rusted" (194).

"Q. Did you, Mr. Davis, personally examine the pin in that swivel?
A. I examined the swivel.
Q. You examined the pin in the swivel and you say that it was not rusted at all?
A. I would say that it was not rusted.
Q. It would turn freely?
A. Yes.
Q. And you don't remember what you did with it after you examined it?
A. *No. I probably* let it lay where I examined it.
Q. Well, how do you know, then, if you let it lay where you examined it, that it was the swivel that was used by the 'Three Sisters' in towing the barge down—the swivel and the bridle?
A. How is that?
Q. If you let this lay on the wharf, how do you know it was the particular swivel of the bridle that was used in this tow on June 8, 1923?
A. *I have no means of knowing.*
The COURT. Q. At what wharf was it when you examined it?
A. 23.
Q. Did you have any other bridle there?
A. *Not that I know of.*
M. HEIDELBERG. Where did you get this swivel?
A. I didn't get the swivel.
Q. I mean the day that you examined it, where did you get it?
A. I didn't get it.
Q. Where did you find it when you examined it; did you find it on the wharf?

A. *I would not say exactly.*

Q. Don't you remember whether you went aboard the boat and brought it out or whether somebody placed it on the wharf for you to examine?

A. *I do not.*

Q. You don't remember where you examined, do you?

A. On Pier 23 or on the boat, *probably.*

Q. You remember you examined the *rope* on the pier, don't you?

A. Yes.

Q. Or did you examine the rope on the pier?

A. Yes, I examined the *rope* on the pier.

Q. But you don't remember whether you examined the *swivel* on the boat or on the wharf?

A. *I do not"* (194, 195, 196).

The witness knew nothing of the use of the rope and swivel in the interim between the time when the barge was towed to Point Reyes and the time of the down trip from there, but testified that he *thought it was on Pier 23* during that time (195, 196). This was contrary to the testimony of Captain Kruger that it was *on the "Three Sisters"* during that time. He does not remember whether he put the tow line on the "Three Sisters" or whether he went aboard of her and got it (195). He was entirely unable to fix the time when he says he examined the swivel, either with reference to the day of the month or day of the year, or with reference to the date the accident happened. It is true that in answer to the court's question, "Did

you examine the bridle just before she went out on that last trip to bring back the barge?" the witness answered "Yes" (197). *It is submitted with deference that the witness thought this was the proper answer to give to the court's question, for his testimony as a whole shows that he had not the slightest recollection of examining the bridle, much less of when.* The witness did not know that the swivel had been *in the hold of the "Three Sisters" since the up trip,* though Captain Kruger testified that such was the fact; he did not get the swivel from the hold at the time he says he examined it, and says that he does not remember seeing anyone else get it from the hold (198, 199).

"Q. Where did you find the swivel?

A. *I don't remember.*

Q. And yet you do remember that you examined it?

A. Yes.

Q. And you examined it minutely, carefully?

A. *That is my business.*

Q. Answer my question. I say do you now remember that you did examine this particular swivel on or about the 5th day of June, 1923, very carefully?

A. I remember of examining the tow line, the bridle (199).

Q. Where did you find the bridle?

A. *I don't remember where I found the bridle.*

Q. Was the bridle connected with the swivel when you found it?

A. Was the bridle connected with the swivel?
Q. Yes?
A. *It probably was.*
Q. It probably was; I am asking you was it?
A. Yes" (199, 200).

"Q. What kind of an outfit was this particular swivel?
A. *Exactly, I don't remember"* (200).

"Q. I believe you testified, Mr. Davis, that you did not know what you did with this swivel after you made your examination of it?
A. *I don't remember what I did with it.*
Q. Then I ask you again, how it is that you know that the swivel you examined was the swivel which was used in the tow from Point Reyes down here on the 8th day of June, 1923. You don't know that it was, do you?
A. *Well, I have no proof for it.*
Q. Did you ever see that swivel afterwards?
A. *I did not.*
Q. What happened to that tow rope when the 'Three Sisters' brought it in; did you ever see that afterwards?
A. Yes, that tow rope was put on the dock.
Q. When; I mean in relation to the accident, when was it?
A. *I don't remember just when.*
The COURT. It must have had the swivel attached to it.
Mr. HEIDELBERG. That is just what I am getting at, may it please the Court.
Q. When was that put on the dock?
A. *I don't remember.*
Q. You don't remember even whether it was in the month of June, or not, do you?
A. It might have been.
Q. You didn't make any other examinations of that rope during the month of June, did you?
A. Not that I know of.
Q. Did you ever see that rope after June 8, 1923?

A. Yes, sir.

Q. You don't remember when, though?

A. Yes, we had rough weather one night, and I went down and tied up the boats.

Q. And you used the tow rope to tie up the boats?

A. I did.

Q. And at that time it didn't have the parts of the bridle attached to it, yet, did it?

A. *I think not.*

Q. As port engineer, didn't you ask what had happened to that bridle when the 'Three Sisters' came in?

A. *I don't remember.*

Q. You don't remember whether you asked that, or not?

A. *No.*

Q. Didn't you ask what had happened to the swivel?

A. *No.*

Q. Didn't you know you had borrowed that swivel and bridle from Crowley's, and that you had to return it?

A. I never borrowed it'' (203, 204, 205).

"Q. You never saw the parts of the bridle that were attached to the bitts on the barge after the accident, did you?

A. *I did not.*

Q. Didn't you make any inquiry about it?

A. *I don't remember.*

Q. You were in charge of the equipment of A. Paladini Inc. at that time, were you not?

A. *I was.*

Q. Did you not deem it your duty to make inquiry as to what had happened to the bridle on that boat?

Mr. LILLICK. That is objectionable, your Honor, what he deemed to be his duty is not pertinent here.

The COURT. Let him answer it.

A. *Well, I don't remember whether I did inquire, or not.*

Mr. HEIDELBERG. Q. Didn't Crowley make a demand on you later for the production of that bridle and the swivel?

A. *I believe he did some time later*" (205, 206).

"Q. Did you go aboard the 'Three Sisters' that night?

A. I did.

Q. Did you make an examination of the towing apparatus there on that boat that night?

A. *I did not.*

Q. You knew that owing to the breaking of this towing apparatus there had been a serious accident, did you not?

A. *I did.*

Q. You were in charge of the equipment for A. Paladini, were you not?

A. *I was.*

Q. And you say you made an inspection of that equipment three or four days prior to that time, did you not?

A. I did.

Q. Were you not somewhat interested in finding out how the equipment had broken?

A. At that time I was interested in getting the barge back, sending a towboat out after her" (208).

"Q. And you didn't ask Captain Kruger anything about how the accident happened?

A. Not at that time.

Q. And you didn't make any inspection of the apparatus, at all?

A. Yes, sir.

Q. What did you inspect?

A. *I went down in the engine-room and looked over the engine.*

Q. I mean of the towing apparatus, in particular.

A. *I never inspected the towing apparatus.*

Q. And yet you knew there had been an accident by reason of the breaking of that towing apparatus?

A. Someone telephoned to me.

Q. And you knew it when you got aboard the 'Three Sisters' didn't you?

A. *Yes, sir*" (210, 211).

"Mr. Lillick. Q. When you saw the bridle that was taken by the 'Three Sisters' when she went up to bring the barge back, did A. Paladini, Inc. have any other bridle?

A. No, sir, *not that I know of.*

Q. This was a borrowed bridle?

A. *So I understand.*

Q. And the bridle that you did inspect that you have testified to was the only bridle that A. Paladini, Inc. had down at the dock at that time, was it?

A. It was the only one *I know of*" (217).

It will be noted that petitioner did have another bridle at the time of the trial (202, 203, 207, 218, 219, 220, 221, 222, 250).

"Q. Now let me ask you if it is not a fact that you did not make a minute and careful examination of that other swivel?

A. I am sure that I did.

Q. But you now give it as your testimony that the only difference between that swivel and this swivel is the fact that that swivel was probably a larger swivel than this, and that it had a thimble instead of the shackle?

A. *As far as I know.*

Q. As far as you know. You looked at both of them. You inspected the other one, didn't you?

A. *But that has been a long time ago.*

Q. But you thoroughly inspected it at that time, and you knew the exact condition of it, didn't you?

A. The other one was standard construction'' (222).

If the court should believe that Mr. Davis did make any inspection of the bridle or swivel, it cannot but be satisfied that such inspection was purely casual. The language of Judge Wolverton in *denying limitation of liability* for the sinking of a vessel in ordinary weather is peculiarly applicable:

> "The O'Reillys were the manager and superintendent, respectively, of the libelant. They have testified fully as to their knowledge of the condition of the barge at the time of the demise. They show that each of them was in the hold of the barge from time to time, one of them only a short time before she was given into the charge of the Portland & Asiatic Company, and made observations as to her condition. But it is clear that neither of them made any critical or careful examination at any time, with proper lights to aid them in determining her condition. Neither of them would say with persuasion that the keelson was not broken, as asserted by Seaman, or that the other conditions as portrayed by the latter did not exist.''

Oregon Lumber Co. v. Portland & Asiatic SS. Co., 162 Fed. at 922 (D. C. Ore.);

McGill v. Michigan S. S. Co., 144 Fed. 795 (C. C. A. 9), quoted infra.

In the present instance it stands admitted that no one on behalf of petitioner examined the cable or swivel at Point Reyes before the beginning of the

voyage on which the men were injured, her master and only deckhand testified that they did not do so. The record shows, without contradiction, that Davis himself was at Point Reyes on the day before the "Three Sisters" left for San Francisco on the voyage in question (Carlsen, 291, 292) but he made no examination there. The vague and inferential testimony of Davis that he made an examination before the vessel left San Francisco is positively contradicted by the testimony of Urquhart, above quoted, that the swivel was frozen and the bridle rusty, both at the beginning of the voyage from San Francisco with the barge, and at the beginning of the voyage from Point Reyes. As has been pointed out, Davis was a naturally biased witness. *Urquhart was a disinterested witness,* and an *actor* with respect to the cable and swivel, since he placed it over the bitts on the barge on both trips, having actually had to untwist the legs of the cable which were twisted together near the swivel. It will also be noted that Urquhart's deposition was the first testimony taken in the case, and was taken months before Davis testified.

As has been before remarked, *the petitioner did not produce at the trial any part of the bridle, nor the thimble, nor the swivel.* Its only explanation for the non-production of them was that the petitioner did not know that claimants would make claim against petitioner and that petitioner was not immediately advised that claimants would do so.

Mr. A. Paladini first testified that it was "six or eight months" after the injury before he knew that claim would be made (240). He later testified that Mr. McShane first called on him about "three months after the accident" (426, 427). Mr. McShane, one of the attorneys for claimant, testified that he saw petitioner not more than a week after claimant Carlsen's visit to him (432, 433, 434, 435), and Carlsen testified that it was not more than five weeks after he was injured that he visited Mr. McShane (437), showing that petitioner knew *six weeks* after the accident that claims would be made. Mr. McShane positively testified, contrary to A. Paladini, that he did not mention anything about compensation insurance (435); but even if he had done so it would have afforded no excuse for the non-production of the physical evidence. Moreover, corporations of the magnitude of A. Paladini, Inc., are accustomed to scenting claims even though they do not in fact materialize. Even could the failure to produce any part of the broken bridle be overlooked, failure to produce or account for the swivel and the thimbles attached to it must persist. The evidence shows that, *although borrowed from Crowley Launch and Tugboat Co., neither swivel or thimbles or any part of the bridle were returned, and that compensation was made for the loss.* If the swivel was a proper swivel *it most certainly would not have been thrown away.* The failure to produce, in conjunction with the failure of the master and deckhand of the "Three Sisters" to

make any examination of such tackle at any time, in view of the positive testimony of Urquhart, and the unescapable fact that the bridle *did in fact break in two distinct places,* not only discredits the testimony of Davis, but absolutely fixes a liability upon petitioner against which it is not entitled to limit.

As the court knows, the highest proof of which any fact is susceptible is that which presents itself to the senses of the court. *Neglect to produce such evidence by a party who had it in his power justifies the inference that it would operate to the prejudice of his contention.* The following instances of the effect of the non-production of demonstrative evidence in admiralty cases are instructive:

> "The bare production of the rope would have demonstrated the theory of respondent. He had full notice of its importance, and opportunity to produce it. The rope was not produced. Why? It is difficult, if not impossible, to escape the conclusion that the rope was not produced because its production would have contradicted the theory of the defense. As a matter of fact I find that the sling which parted was an old one. This being the case, was the ship responsible? The wear and tear in use of these slings is very great."
>
> *The Phoenix,* 34 Fed. 760, at 762 (D. C. So. Car.).

> "It is claimed, on behalf of the appellee, that the lines were in good condition and practically new. There is no dispute as to this and as to the condition of the lines at the point where they parted. The lines were not produced, and

inspection therefore not afforded to ascertain whether they parted from strain or from being defective or insufficient. The failure to preserve the lines and produce them would justify the inference that, if produced, they would have shown the results of the strain due to the slipping of the barge as it came off the shoal. The Colon, 249 Fed. 462, 161 C. C. A. 418; The Bertha F. Walker, 220 Fed. 667, 136 C. C. A. 309" (District Court decree reversed).

Clyde Lighterage Co. v. Penn. Ry. Co., 258 Fed. 116, at 118 (C. C. A. 2).

"One of the stevedores marked the cover when it was examined the next morning. The failure of the claimant to preserve it and to produce the measurements taken by the ship's carpenter and written down by the superintending engineer that morning, justifies the inference that the cover and the measurements, if produced, would have shown defective equipment. The Phoenix (D. C.) 34 Fed. 760, 762; The Lackawanna, 210 Fed. 262, 127 C. C. A. 80; The Bertha F. Walker, 220 Fed. 262, 136 C. C. A. 309."

The Colon, 249 Fed. 460, at 462 (C. C. A. 2);

The Bolton Castle, 250 Fed. 403, at 404, 405 (C. C. A. 1); (swivel produced but not block);

The Dunnoly, 1924 A. M. C. 1572 (buckled mast);

The Luckenbach, 144 Fed. 980 (D. C. Va.) (broken rope);

The Brittania, 148 Fed. 498, at 499 (D. C. Va.) (broken hawser);

The S. S. Pereire, 19 Fed. Cas. No. 10,979, at p. 226 (D. C. N. Y.) (damaged cases).

It is to be noted in the instant case that petitioner did not offer a word of testimony as to the *age* of the bridle or swivel, the *period during which they had been used,* or the *character of the use* to which they had been subjected. It does appear, however, that it had been "exposed to causes which might have affected its strength" (*The Brittania,* supra).

How far petitioner came from complying with the requirements laid down by the courts for the proof of inevitable accident is apparent; *for petitioner neither showed,* (1) *what was the cause of the accident and that the result of that cause was inevitable, nor did it show,* (2) *all the possible causes, one or other of which produced the effect, and then, with regard to every one of such possible causes, that the result could not have been avoided* (see *The Enterprise,* quoted supra). Indeed, what more frank confession of the total failure to establish inevitable accident than the very questions of petitioner's proctors to their expert, Mohr, on pages 397 and 398 of the record.

2. Petitioner and Its Servants Were Negligent in Divers Other Respects.

The respects in which petitioner was negligent have been covered, for the most part, by what has already been said under heading 1, subdivisions (a), (a′), (a″) and ("b"). The case *res ipsa loquitur* demonstrates that the bridle and swivel used to tow the barge was defective and/or that petitioner's servants were negligent in handling the tow. Attention

will merely be recalled to the particulars of negligence already covered; then ("g" infra) the plain negligence of petitioner's master in failing to warn the injured claimants away from the hawser and in failing to see such warning was observed will be demonstrated.

(a) Neither Master Nor Deckhand Of The "Three Sisters" Ever Inspected The Towing Equipment (Assignment of Errors XII, XVIII, 483, 484).

(Covered supra.)

(b) No One Inspected The Towing Equipment At Point Reyes Before The Commencement Of The Voyage On Which The Injuries Were Sustained (Assignment of Errors XII, XIX, 483, 485).

(Covered supra.)

(c) No One Inspected The Towing Equipment Before The Commencement Of The Voyage To Point Reyes (Assignment of Errors XII, XX, 483, 485).

(Covered supra.)

(d) The Master Of The "Three Sisters" Did Not Manipulate His Engines Or Vary His Towline To Keep The Tow Safe (Assignment of Errors XXII, 485).

(He did not change the speed of his engines: 124, 170, 402, 415; and did not reverse when he saw the first break in the bridle: 96; and did not vary the length of his towline: 172, 402, 415: see: Tugs Osceola & Hercules, 1924 A. M. C. 1030.)

(e) The Master Of The "Three Sisters" Towed With Too Short A Towline (Assignment of Errors XXII, 485).

(See: Carlsen, 295, 296, 302, 303; Haney, 255, 259, 265; Reid, 368, 369, 383, 384; Evans, 343.)

(f) Neither Port Captain Carlton Nor Port Captain Davis Nor Captain Kruger Nor Deckhand Andersen Were Competent To Fill Their Respective Positions (Assignment of Errors, XXI, 485).

(Covered supra: Their own conduct demonstrated the fact—McGill v. Michigan S. S. Co., 144 Fed. 788 at 795, C. C. A. 9; The Cygnet, 126 Fed. 742 (C. C. A. 1), quoted infra.)

(g) The Master Of The "Three Sisters" Was Negligent In Failing To Order Injured Claimants Away From The Hawser And In Not Enforcing Such Order; Injured Claimants Were Not Contributorily Negligent (Assignment of Errors XXIII, XXIV, XXV, 485, 486).

(Note: Contributory negligence in admiralty divides damages proportionately to negligence.)

The petition asserts that the injured claimants were guilty of negligence in being on the after deck of the "Three Sisters", about four feet to one side of the hawser, seated on the deck playing cards (Petition, 9). *There is no support in the record for the statement in the lower court's opinion* that

> "It is not, however, denied that it was a dangerous place, for the reason that the experience of all seafaring men has shown that the vicinity of where a hawser is fastened, when the vessel has another vessel in tow, is a dangerous place" (Opinion, 472; Assignments of Error XXIII, XXIV, XXV).

It is denied that it was a dangerous place (Answers 17, 18; 37, 38) and there is no evidence whatever that the "experience of all seafaring men" has

shown it to be so. *But, if it were dangerous, then the negligence is not that of the non-seafaring claimants in being there, but that of the master in not warning them away and in not seeing to it that his command was obeyed.* He did neither, as will be demonstrated.

The burden of proving contributory negligence, of course, is upon petitioner:

> *Coggeshall Launch Co. v. Early,* 248 Fed. 1, at 5 (C. C. A. 9).

Aside from all other considerations, had the court or proctors in this case been on the vessel they would have been in the same place without a thought of any danger. When it is borne in mind that, *as a practical matter, it was the only place where they could be,* the assertion of petitioner collapses. The whole port side of the vessel was filled with equipment, as was the small space in her bow (Carlsen, *on the vessel*: 274, 275, 276; in the courtroom: 305, 307, 320, 321, 322). Even if there had been nothing in the space at her bow, it was obviously not a place for *anyone* to ride, much less *everyone.* The bow of a small boat, as the court knows, is constantly pounding up and down when she is in ordinary swells, slapping water out on both sides, so that there is more or less spray over the bow (Urquhart, 50, 51). The suggestion becomes humorous when it is borne in mind that *Captain Kruger himself* had no hesitation in being in the same place: for the testimony remains uncontradicted that *he was back there several times* (Cap. Kruger, 136,

137) and cleaning some fish for Carlsen (Carlsen, 294, 295, 309; Woods, 421), the Captain merely testifying that he didn't remember cleaning the fish, not that he did not do so (136, 137).

Moreover, petitioner's contention wholly disregards the most cogent of all evidence against contributory negligence: *the instinct of self preservation,* with which men working at the profession of claimants are naturally, through their experience, unusually endowed:

> "The probative force of this presumption in suits for personal injuries where the defense is contributory negligence has been recognized and enforced in many cases. We cite and quote from some of them.
>
> 'The natural instinct', says Agnew, J., in Allen v. Willard, 57 Pa. St. 374, 380, 'which leads men in their sober senses to avoid injury and preserve life, is an element of evidence. In all questions touching the conduct of men, motives, feelings and natural instincts are allowed to have their weight, and to constitute evidence for the consideration of courts and juries.'
>
> In the case of Railway Co. v. Price, 29 Md. 420, 438, the court said:
>
> 'These facts and the circumstances of the case were proper to be considered by the jury, and in connection with these facts and circumstances it was competent to the jury to infer the absence of fault on the part of the deceased from the general and known disposition of men to take care of themselves, and to keep out of the way of difficulty'."
>
> *The City of Naples*, 69 Fed. at 797 (C. C. A. 8th).

The master did not warn claimants to keep away from the stern (Reid, 366, 367; Woods, 420; Rowe, 424; Urquhart Dep., 44; Evans, 341; Haney, 255; Carlsen, 293, 294, 322, 323). *The master's own testimony shows that he never gave such a warning.* The most he *says* he said is that he said "to the men standing back aft" (33) *"to keep clear of the towline"* (95). He does not *say* that he told them not to remain *on the stern* (95, 137, 138), or that he said anything to the *two injured men* (95, 137, 138). He admits that the men did not reply to what he says he said, and may not have heard him:

> "Q. You say that they did not reply to you when you told them to stay clear of the line?
> A. *No, sir, they did not.*
> Q. How do you know they heard you when you said that?
> A. *I don't know, I wouldn't testify to that"* (Cap. Kruger, 137, 138).

Even if he did give any warning, he did not do so seriously, and made no attempt to see that it was observed. At most it was a casual remark:

> "Q. You were the captain on that boat, weren't you?
> A. Yes.
> Q. And you could tell them to go wherever you pleased, couldn't you?
> A. Yes.
> Q. And you could make them do it, couldn't you?
> A. Yes.
> Q. But you didn't do it, you let them stay right there?

A. That was their own lookout, not mine. If I tell a man to stay clear of a towline he ought to have sense enough to stay clear of it.

Q. And after you told them you went back and forth and you saw them there several times, didn't you?

A. Yes'' (Cap. Kruger, 137).

Obviously, *if the men were in a dangerous place they did not know or appreciate it, and the master could have avoided the danger, if he thought it existed, by emphasizing his warning, enforcing it, or if not then obeyed, by stopping the engines and keeping all strain from the line.* With these facts in mind, the application of the following authorities is clear. They are peculiarly in point on this phase of the case, and those decided by the Circuit Court of Appeals for this Circuit are particularly commended to its attention:

"The steerage passengers had the right to go on the steerage deck for air and exercise, and it was usual for them to do so when the conditions of weather and sea were favorable. When the conditions were not favorable, it was the duty, and the evidence shows that it was the custom, *of the officers of the vessel to so warn the passengers.* If the danger upon the deck was not apparent and obvious to the libelants, exercising reasonable care for their own safety, they assumed no risk, *unless warned by the officers of the vessel of the danger,* which was not a fact; and it does not appear from the evidence that the danger was obvious or apparent, or that the libelants had been on deck long enough to apprehend the danger from their own observation. The conclusion is that the libelants did not assume the risk, and that

they were not guilty of contributory negligence."

The Korea Maru, 254 Fed. at 400, 401 (C. C. A. 9);

Coggeshall Launch Co. v. Early, 248 Fed. 1 (C. C. A. 9).

"At the end of his direct examination this witness was asked, 'Did you have any means or power to prevent them?' to which question he answered: 'I had no power whatever, I was powerless. They took the command away from me, and took control of the boat, and I could not do nothing.'

A careful perusal of the entire testimony of this witness of itself shows that there was no justification whatever for his statement that the boat was started on its perilous journey against his protest, or that the control of it was taken from him by the passengers. *If powerless in the premises, it was only because he did not have the stamina to assert and exercise the authority with which he was clothed, and which the law and good seamanship made it his imperative duty to enforce. The evidence is overwhelming not only that he made no objection* to starting the boat with its overload, but that, according to his own testimony, one, at least, of his own sailors took an active part in shoving it off the sand and into a floating condition, which appears without conflict to have been a matter of considerable difficulty; so much so that several of the passengers had to assist the sailors in accomplishing it—some by means of oars, and others, having high boots, by getting into the water and pushing the boat.

Let it be assumed that, when the officer announced that the boat was overloaded and that it was 'risky', it became the duty of all the

passengers to get out—as well those who had entered when there was ample room as those who had caused the overloading—and that every one who remained thereupon became guilty of contributory negligence; *such fact becomes immaterial, in the face of the further fact that the officer, with full knowledge of the overloading and consequent dangerous condition of the boat, subsequently not only started it on its perilous trip, but, after starting, and while it was yet in smooth water, and after observing that it was down by the head, and with but little freeboard, made no effort whatever to return to the shore to make the boat safe by discharging some of the passengers. It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boat's complement of men. According to his own testimony, he made nothing more than a milk and water protest against the entry of any one;* and even if there had been on the part of the passengers an effort to overpower the officer and force their way into the boat—of which there is not the slightest evidence—*it still remained the imperative duty of the officer in command to refuse to start the boat until enough of the people had gotten out to make it safe. Not the slightest attempt appears to have been made by this officer to perform his duty in that regard, and for his gross negligence in that respect, as well as in failing to return to the shore while he yet had sufficient opportunity, the ship is clearly liable, for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.* Grand Trunk Rv. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Louisville & Nash-

ville Ry. Co. v. East Tennessee, V. & G. Ry. Co., 60 Fed. 993, 9 C. C. A. 314; Harrington v. Los Angeles Ry. Co. (1903, Cal.), 74 Pac. 15.

This doctrine, which is well established, fits the present case exactly. The case of Lynn v. Southern Pacific Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710, is, in principle, also precisely in point. In that case the plaintiff passenger was unable to find room inside a car, and therefore stood upon the platform, from which he was thrown and injured; the evidence tending to show that the train was going at excessive speed. In affirming a judgment for the plaintiff, the Supreme Court of California said:

> 'The defendant should not have allowed so many passengers to have gone upon its cars, and, *if it was unable to prevent them from so doing, it had the right to refuse to move the train under such circumstances;* but, if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platforms, it was under obligation to exercise the additional care commensurate with the perils and dangers surrounding the passengers, by reason of the overcrowded condition of the cars.'

So, here, as has already been said, *if the officer in command of the boat had been unable to prevent its overloading (of which, however, there was no evidence), it was still his right and imperative duty to refuse to start the boat until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to.* But speculation on that

point is no answer to the gross neglect of duty on the part of the officer of the ship."

Weisshaar v. Kimball S. S. Co., 128 Fed. at 400, 401 (C. C. A. 9); 194 U. S. 638; 48 L. Ed. 1162;

The Erastus Corning, 158 Fed. 452 (D. C. Conn.);

Nor. Comm. Co. v. Nestor, 138 Fed. 383 (C. C. A. 9).

"The preponderance of the evidence convinces the court that Christensen saw Nelson just before or at the time the whistle sounded. *He therefore knew that the libelant was in a dangerous position, and even then it was his duty, either to see that the libelant moved from that position of danger, or to see that the gypsy was at once thrown out of gear, so as to avoid the great peril in which the libelant was placed.* For although the libelant had placed himself in a position of some peril which he knew, namely by being within the bight of a rope, the great peril was a peril which he did not know. That peril resulted from the fact that the gypsy head was in gear, so that when steam was given to the engine great danger would ensue to any one in that vicinity.

The principle that the party who has the last opportunity of avoiding the accident is not excused by the negligence of any one else has now become settled law. It is a familiar rule that *where the plaintiff's negligence is so communicated by knowledge that by the exercise of ordinary care and skill the defendant might have avoided the injury the plaintiff's negligence cannot be set up in defense of the action."*

The Steam Dredge No. 1, 122 Fed. at 685 (D. C. Md.).

It has thus been proved, not only that the injured men were not contributorily negligent if the place where they were located was safe; not only that they were not contributorily negligent if it was dangerous; but that if it was dangerous the master (and hence petitioner), was negligent because he *(1) did not order them away from it and (2) did not enforce such command.*

Even had the men been guilty of any contributory negligence, however, it would not defeat recovery, as at common law, but would merely have the effect of *dividing the damages in proportion to the negligence* on each side—not equally as in the case of collisions between vessels:

The Tourist, 265 Fed. at 704 (D. C. Md.);
The Max Morris, 24 Fed. 860, 864; 137 U. S. 1; 34 L. Ed. 586;
The Devona, 285 Fed. 173, 178 (D. C. Me.);
The Iowan, 1923 A. M. C. 303 (D. C. Ore.).

Second: The Petitioner Is Not Entitled to Limit Its Liability.

"The right of a shipowner to limit its liability is dependent upon his want of complicity in the acts causing the disaster, and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service. Parsons v. Empire Trading & Trans. Co., 111 Fed. 208, 49 C. C. A. 302; The Main v. Williams, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381; The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366; In re Myers Excursion Co., (D. C.) 57 Fed. 240; The Republic, 61 Fed. 109, 9 C. C. A. 386;

Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438; The Colima, (D. C.) 82 Fed. 665."

McGill v. Mich. S. S. Co., 144 Fed. at 795-6 (C. C. A. 9);

Re Reichert Towing Line, 251 Fed. 214 (C. C. A. 2);

The Hewitt, 1923 A. M. C. 89; 284 Fed. 911.

It must be apparent from what has already been said under heading "First", supra, that petitioner did not sustain such burden. Since the facts have been quite fully discussed under that heading there is no occasion for repeating them here.

It has been shown, beyond question, that the bridle was unseaworthy, and that petitioner's Port Engineers Carlton and Davis, as well as Captain Kruger, were negligent. This being so, petitioner's *sole remaining contention* in support of its asserted right to limit liability, is that the negligence of its Port Engineers and/or its master *is not the negligence of petitioner* under the Limitation of Liability *Act.* In other words, petitioner's sole remaining contention is that, petitioner being *a corporation,* it need only show that its *technical corporate* officers (president, vice-president, secretary, etc.) were not negligent, in order to limit its liability. This construction of the Limitation of Liability Act as applied to corporations is *wholly erroneous,* as will now be shown.

1. The Petitioner Corporation Was Privy To and Had Knowledge Of the Negligence Shown Under Heading "First" Supra.

(a) The Negligence of Petitioner's Port Captain and/or Its Master Was Petitioner's Negligence Under The Limited Liability Act Assignment of Errors XXVI, XXVII, XXVIII, XXIX, 486, 487).

Petitioner cannot deny that if the bridle or swivel were defective, and its *president,* for instance, had been in charge of the "Three Sisters" at Point Reyes, and had not there made any examination of them (as is the fact both as to petitioner's port captain Davis and master Kruger), it would not be entitled to limit its liability. But petitioner's contention is that even though its port captain or its master (who was directly employed by its president: 70, 223) were negligent, the negligence of either or both of them does not charge petitioner under the limited liability act. *This assumption is plainly erroneous.*

The voyage under consideration, and with which alone claimants were concerned, was from Point Reyes to San Francisco—not a round voyage from San Francisco to Point Reyes and return. The only representatives of petitioner at Point Reyes when or before the voyage to San Francisco commenced were port captain Davis, the master and the deckhand. The record, without dispute, shows that none of them there made any inspection of the towing equipment. Davis was at Point Reyes on the day before the voyage to San Francisco began (Carlsen, 291, 292), but the record shows no inspection by him. Claimant Carlsen told Davis, at Point

Reyes, that the master of the "Three Sisters" was lying at Point Reyes waiting to take the men to San Francisco, that they were going on her, and that her master had told Carlsen that he had orders to wait for them (Carlsen, 292).

It would seem to be obvious that a corporation cannot escape full liability by taking the precaution of keeping *its officers in one place, and operating its vessel from another place where its only representatives are its port engineer and master.* A. Paladini, the president of petitioner corporation, himself testified that "the actual operation of the vessels, the equipment of the vessels, the running of the vessels" was *entrusted to its port engineer* (Paladini, 224 et seq.).

The port engineer was Davis, who, therefore, was the *managing officer of the petitioner* as to its vessels. That what such an officer knows, or should know, the corporation knows or should know is clear:

> "As the petitioner is a corporation, its 'privity or knowledge' must be that of its managing officers. Craig v. Continental Ins. Co., 141 U. S. 638, 646, 12 Sup. Ct. 97, 35 L. Ed. 886. While ordinary agents and servants, including a master of a vessel, are not within that category, a 'managing officer' is not necessarily one of the head executive officers, *but is any one to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business.* The Colima (D. C. S. D. N. Y.) 82 Fed. 665; Parsons v. Empire Transp. Co., 111 Fed. 202, 49

C. C. A. 302 (C. C. A. 9th Cir.), certiorari denied 183 U. S. 699, 22 Sup. Ct. 935, 46 L. Ed. 396; Oregon Lumber Co. v. Portland & Asiatic S. S. Co. (D. C. Or.) 162 Fed. 912; Sanbern v. Wright & Cobb Lighterage Co. (D. C. S. D. N. Y.) 171 Fed. 449, affirmed 179 Fed. 1021, 102 C. C. A. 666 (C. C. A. 2nd Cir.); In re Jeremiah Smith & Sons, Inc., 193 Fed. 397, 113 C. C. A. 391 (C. C. A. 2nd Cir.); Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., 197 Fed. 703, 117 C. C. A. 97 (C. C. A. 9th Cir.); The Teddy (D. C. W. D. N. Y.) 226 Fed. 498. The petitioner, long before the accident in question, had committed the general management and superintendence, including maintenance and repair of its vessels, to a superintendent of its marine department. *The latter was therefore clearly a managing officer of the corporation within the before-mentioned rule, and his 'privity or knowledge', if any, is chargeable to the petitioner.*"

Erie Lighter 108, 250 Fed. at 494 (D. C. N. J.);

Weishaar v. S. S. Co., 128 Fed. 400 (C. C. A. 9th), certiorari denied 194 U. S. 638; 48 L. Ed. 1162.

"It also appears plainly enough that the *superintendent of the defendant* was empowered to direct claimant as to the manner in which the work was to be performed, and that in the exercise of a proper degree of care he should have caused an inspection of the bridge to have been made before directing that it be used as a leverage for the hoist. He knew, or should have known, that the bridge was incapable of bearing the strain of the A-frame, *and his knowledge must be deemed to be the knowledge of the owner, within the meaning of section*

4283 of the Revised Statutes, providing for the limitation of liability of shipowners for losses caused without their privity or knowledge. In re Jeremiah Smith & Sons, 193 Fed. 395, 113 C. C. A. 391."

The Teddy, 226 Fed. 498 (D. C. N. Y.);

The Colima, 82 Fed. 665 (D. C. N. Y.);

Ore. Lumber Co. v. Portland etc. S. S. Co., 162 Fed. 922 (D. C. Ore.);

Re Reichert Towing Line, 251 Fed. at 217 (C. C. A. 2);

Myers Excursion & Nav. Co., 57 Fed. 240; Affirmed: *The Republic,* 61 Fed. 109 (C. C. A. 2).

"It is well settled that the owner of a vessel is not entitled to limit its liability arising from unseaworthiness of a vessel. If the libelant was ignorant of the condition of the vessel, it was because of a negligent examination, as in The Republic, 61 Fed. 109, 9 C. C. A. 386."

Braker v. Jarvis Co., 166 Fed. 987, at 988 (D. C. N. Y.).

Where such managing officer is *at a port other than that where the technical officers are* present, the corporation is *doubly* chargeable with and privy to the negligence of such managing officer, as this Honorable Court has clearly pointed out, in denying limitation for a loss due to unseaworthiness of a barge:

"The appellee, being a corporation, *necessarily acts through agents of different kinds.* * * * Surely the man to whose management the company's entire fleet of boats in those remote

waters, as well as all its property in that region, was entrusted, should be regarded as the company's representative, and his dispatch of any of the company's boats to a neighboring point as being at least within his ostensible authority. *His knowledge must, therefore, be regarded as his company's knowledge, and his acts as the acts of the company.* That it was gross negligence to ship goods from St. Michael to Nome at the beginning of the winter season in barge No. 2 has already been sufficiently shown. But the appellee, through its superintendent, was guilty of further negligence in failing to send one of its tugs, and tow the barge to a place of safety, which the evidence shows might very readily have been done by the exercise of reasonable diligence. The truth is, as is abundantly shown by the record, that Patterson knew nothing about the shipping business, and was wholly unfit for the position in which the appellee permitted him to remain, and thus held him out to the public."

Parsons v. Empire Shipping Co., 111 Fed. 202, at 208 (C. C. A. 9th); *certiorari denied:* 183 U. S. 699; 46 L. Ed. 396;

The Barkentine Rolph, 1924 A. M. C. 942; 299 Fed. 52 (C. C. A. 9th).

Of course limitation is not allowed where an owner does not *actually know* of a defect or negligence, if he was *negligent in not knowing* of it. An owner cannot shut his eyes to negligence as a means of avoiding privity or knowledge of it. Privity or knowledge includes:

"*means of knowledge, of which he is bound to avail himself* of a contemplated loss, or of a

> condition of things likely to produce or contribute to the loss, *without adopting appropriate means to prevent it.* * * * It is the duty of the owner, however, to provide the vessel with a competent crew; and to see that the ship, *when she sails,* is in all respects seaworthy. He is bound to exercise the utmost care in these particulars—such care as the most prudent and careful men exercise in their own matters under similar circumstances; and if by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity within the meaning of the act."
>
> *Lord v. Goodall S. S. Co.,* 15 Fed. Cas. No. 8506, p. 887 (D. C. Cal.).

Even if Davis had not been at Point Reyes, therefore, the master would have been the managing officer with whose negligence petitioner would be charged and to whose negligence it would be privy. But port captain Davis was there.

Moreover, even had Davis not been at Point Reyes, and even if the master would not then have been the only managing officer there, nevertheless, as pointed out in detail under division "First", supra, and heretofore under the present division, Davis was negligent at San Francisco *in not examining the bridle and swivel,* or, assuming he did so, in examining them only *casually*:

> *Oregon Lumber Co. v. Portland & Asiatic Co.,* 162 Fed. 922 (D. C. Ore.), quoted supra;
>
> *McGill v. Michigan S. S. Co.,* quoted supra.

So that, its *port engineer,* having been negligent, whether at Point Reyes or at San Francisco, *petitioner was negligent and charged with privity and knowledge under the limited liability law.* It has already been pointed out that Carlton, who was port engineer at some time, made no examination of the swivel or bridle; and the fact that petitioner deliberately left a hiatus in the record as to when Carlton ceased to be port engineer and when Davis succeeded him is to be borne in mind. Neither Davis, Carlton nor Paladini would say when Davis replaced Carlton.

(b) The Port Captain and the Master Were Incompetent (Assignment of Errors XXIX, 487).

Petitioner's port captain Davis and its master were employed by its president. *Both were shown by their conduct to be incompetent.* The record shows no exercise of due diligence in selecting the master. Since the petitioner is bound by and privy to Davis' negligence, whether or not due diligence was used in selecting him is not material, as has been shown; but the record does not show that due diligence was used in selecting him. Moreover, the conduct of Davis and the master, which has already been detailed, proves that no diligence was used in the selection of either of them:

> "The acts of Evers in handling the oil, and his testimony in regard to his knowledge of its properties, *are such as to carry the conviction that he did not have the knowledge and experience necessary to render him competent to*

have charge of the work involved in changing the vessels of the Steamship Company from coal-burners to oil-burners, and the care and protection of the oil. He had no knowledge of the properties of California fuel oils. There is no evidence that he thought it necessary to acquaint himself with their properties. He handled the oil with apparently no regard to the danger involved.

The right of a shipowner to limit its liability is dependent upon his want of complicity in the acts causing the disaster, and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service. (Citing cases.) In the Cygnet, 126 Fed. 742, 61 C. C. A. 348, the Circuit Court of Appeals held that the analogous provisions of the Harter Act cannot be invoked to relieve a vessel from liability for a loss occurring from errors in navigation on the part of the master *sufficiently negligent to raise a presumption of his incompetency merely upon a showing that the owners had no knowledge or reason to believe that he was incompetent.* The Court said:

> 'There is no evidence in the record that the owners of the tug, either the record owners or the owner pro hac vice, had made any particular inquiries as to his competency. The petitioners seem to think that it is sufficient to maintain their case that the owner or owners had no reason to believe that the master was not competent; but this form of statement is not sufficient, because it does not comply with the statute, which requires "due diligence".'

Referring to the negligent act of the master *in failing to observe whether his tow was straightened out on its course,* the court said:

'An omission so gross as this raises so strong a presumption of fact that the master was not competent as practically to throw the burden on the petitioners to establish the proposition that they used due diligence with reference to his selection, whether the statute does or not impose such a burden.'

The language of the court in that case is, we think, applicable to the present case. *The acts of Evers and his testimony are such as to raise a strong presumption of his incompetency.* The steamship company has introduced no testimony whatever, either to show that he was competent or to indicate that at the time of changing its vessels from coal-burners to oil-burners, or at any time, it made any inquiry as to his knowledge of the properties of the dangerous agency they were about to introduce upon their vessels, or his fitness to handle it. The limitation of its liability must be denied."

McGill v. Michigan S. S. Co., 144 Fed. 788, at 795 (C. C. A. 9);

The Cygnet, 126 Fed. 742 (C. C. A. 1).

2. The Petitioner Is Not Entitled to Limit Its Liability for Injury to Claimants, Who Were Passengers, Because of R. S. 4493 (Assignment of Errors XXX, XXXI, 487).

The injured claimants having been passengers on the "Three Sisters", which was therefore as to them, a passenger vessel, are precisely within R. S. 4493. If petitioner claims that she was not a passenger vessel it cannot deny that she was at least a "tug-boat, towing-boat and freight-boat" under R. S. 4427. It will only be necessary to quote these statutory provisions, with the amendment of 1918 to R. S. 4493, and to refer this court to its own decision in

the *"Annie Faxon"* to show that petitioner is not entitled to limit its liability, even assuming that it had no privity or knowledge of the deficiency of the bridle and swivel or of the negligence of its servants. *When petitioner used the "Three Sisters" to carry passengers, without having her inspected, or obtaining a certificate of inspection, petitioner withdrew itself from the protection of the limited liability law.*

> "Sec. 4493. (Liability of master and owners for damage to passengers.)
>
> Whenever damage is sustained *by any passenger* or his baggage, from explosion, fire, collision *or other cause,* the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured *to the full amount of damage if it happened through any neglect or failure to comply with the provisions of this Title,* or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence or wilful misconduct of any master, mate, engineer, or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer, or pilot, and recover damages for any such injury caused by any such master, mate, engineer, or pilot."
>
> 9 Fed. Stat. Ann., 2nd 468.

This section imposes the further *condition* upon the right to limitation of liability for injuries to passengers that the petitioner *is not entitled to limit unless it has complied with the inspection*

laws. The Title referred to in R. S. 4493 is "Steam Vessels;" but by amendment of 1918, "steamer" was changed to "any vessel":

> "Sec. 4465. It shall not be lawful to take on board of any vessel a greater number of passengers *than is stated in the certificate of inspection,* and for every violation of this provision the master or owner shall be liable to any person suing for the same to forfeit the amount of passage money and $10 for each passenger beyond the number allowed.
>
> The master or owner of the vessel, or either or any of them, who shall knowingly violate this provision shall be liable to a fine of not more than $100 or imprisonment of not more than thirty days, or both."
>
> Fed. Stat. Ann. 1918 Supp. 827.

> "Sec. 4427. (Tug boats, freight boats, etc.) The hull and boiler of *every tug-boat, towing-boat, and freight-boat* shall be inspected, under the provisions of this Title; and the inspectors shall see that the boilers, machinery, *and appurtenances* of such vessel are not dangerous in form or workmanship, and that the safety-valves, gauge-cocks, low-water alarm-indicators, steam-gauges, and fusible plugs are all attached in conformity to law; and the officers navigating such vessels shall be licensed in conformity with the provisions of this Title, and shall be subject to the same provisions of law as officers navigating passenger-steamers."
>
> 9 Fed. Stat. Ann. 2nd 437.

It is admitted that the "Three Sisters" had no "Certificate of Inspection" (442) and none was produced. Therefore, *even were petitioner not charge-*

able with privity and knowledge, nevertheless it would not be entitled to limitation:

> *"There is in the record, it is true, no distinct or positive evidence that the failure to inspect the boiler after the repairs of June, 1883, was the cause of the explosion, or that an inspection at that time would necessarily have disclosed the imperfections, and the weakness which resulted in the accident. It can only be said that if a proper inspection had been made at that time the weakness of the boiler would probably have been detected.* As we construe the statute, it was as much the duty of the owner of the steamship to cause an inspection of a boiler that had been repaired in a substantial part, as it was to cause an inspection of a new boiler, before using the same. The repaired boiler was, to all intent, a new boiler. If, in this case, the explosion had been of a new boiler that had never been used, *it could scarcely be contended, we think, that the owner would not be liable for the full extent of the injuries to the passengers under the provisions of section 4493. That section was intended for the better protection of the life of passengers, and, if it be not given the construction which we have placed upon it, its purpose will not be accomplished.* Probably it could never be proven in any given case of explosion that the accident occurred through a failure to inspect the boiler. *There would be little or no protection* in holding that, after an explosion, an injured passenger, in order to recover under section 4493, must prove that, notwithstanding the absolute failure to comply with the inspection law, there were in the boiler defects that would necessarily have been detected if an inspection had been made before using the same. We are unable to find that a construction has been

placed upon this statute by any court. In Butler vs. Steamship Co., on page 553, 130 U. S., and page 618, 9 Sup. Ct., Mr. Justice Bradley said:

> 'Perhaps, if it should appear that the requirements of the steamboat inspection law were not complied with by him, he would not obtain a decree for limited liability. That is all. We say "perhaps," for it has never yet been decided, at least by this court, that the owner cannot claim the benefit of limited liability when a disaster happens to a coastwise steamer without his fault, privity, or knowledge, even though some of the requirements of the steamboat inspection law may not have been complied with.'

The construction which we have given to the statute seems to us just and reasonable, and consonant with the purposes for which the law was made. It is true that in the pleadings no reference is made to the failure of the railway company to inspect the boiler after it was repaired, and no ground of liability is charged against the company, under the provisions of section 4493, by any of the injured passengers, or their representatives. On the contrary, they all seek to recover on the ground of the negligence of the company in continuing the use of a boiler known to be old and defective. But we do not regard these facts as material. *The failure to comply with the inspection law may, in our judgment, be invoked to prove that the owner is not entitled to the benefit of the limitation of liability law, as claimed in the libel and petition.*"

The Annie Faxon, 75 Fed. 312 (C. C. A. 9);

Followed: *Hines v. Butler*, 278 Fed. at 881, (C. C. A. 4); Certiorari denied 257 U. S. 659; 66 L. Ed. 421.

IV.

CONCLUSION.

It is respectfully submitted that the decree of the lower court should be reversed, and that this Honorable Court should hold: (1) that petitioner was negligent and liable for the injuries sustained by claimants; (2) that petitioner is not entitled to limit such liability; and (3) that the injunction issued by the District Court be dissolved and the actions filed by claimants in the State Court be allowed to proceed.

Dated, San Francisco,
March 4, 1925.

Respectfully submitted,
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JOSEPH J. MCSHANE,
Proctors for Appellants,
Carlsen and Sauder.

REDMAN & ALEXANDER,
BELL & SIMMONS,
Proctors for Appellant,
Aetna Life Insurance Company.

No. 4452

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM CARLSEN, JOHN SAUDER and AETNA LIFE INSURANCE COMPANY (a corporation), claimants,

Appellants,

vs.

A. PALADINI, INC. (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Cases Cited

STATUTES OF THE UNITED STATES.

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Appellee.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

This is an appeal from a final decree of the District Court in a limitation of liability proceeding wherein petitioner sought to limit its liability for personal injury claims arising from a towage accident upon the Pacific Ocean on a voyage from Drake's Bay to San Francisco. The petition is in the usual form with a prayer in the common alternative, viz.: that the absence of liability be decreed or that liability be limited.

Four claims were filed with the Commissioner, the first by claimant William Carlsen, for personal

injuries, in the sum of $50,960.00; the second by claimant John Sauder for personal injuries in the sum of $50,800.00, and the third by claimant Aetna Life Insurance Company, a corporation, claiming jointly with claimant William Carlsen, in the sum of $5960.00 by virtue of the subrogation provisions of the Workmen's Compensation and Safety Act of 1917 of the State of California; and the fourth by said claimant Aetna Life Insurance Company, a corporation, claiming jointly with claimant John Sauder, in the sum of $50,800.00 by virtue of said subrogation provisions of said Workmen's Compensation Act. The claimants answered the petition, denied that petitioner was without privity or knowledge, and alleged that petitioner was guilty of an act of specific negligence, to-wit: the use of a "rotten, unsound and defective" tow line and bridle. Upon the two issues thus joined the District Court decreed, *first,* upon the issue of limitation of liability, that the accident did not occur with the privity or knowledge of petitioner, and *second,* upon the issue of negligence that the accident was not caused by the design or negligence of petitioner, and accordingly denied the liability of petitioner *in toto* and perpetually enjoined the maintenance of actions upon said claims. From this final decree of the District Court all of said claimants have appealed.

We shall not discuss or outline the facts at length in this introductory portion of our brief. However,

in completion of the narrative on page 3 of claimants' brief we desire here to point out that although petitioner, under its contract with Healy-Tibbitts Construction Company was to freight and deliver at Point Reyes all materials and equipment necessary to complete the wharf, deliver supplies three times a week, and on completion, transport all equipment back to San Francisco, yet *petitioner was not by its contract obligated to transport the Healy-Tibbitts employes either to Point Reyes or back to San Francisco.* It is not contended that the men were brought back under any contract with them direct, such as the payment of a fare, so that in considering this case, it should be borne in mind that there was no contractual bond whatsoever existing between petitioner and claimants, therefore any liability asserted by claimants must be founded upon tort.

We will correct also what appears to be an oversight of claimants in stating a certain dimension of the towing bridle. In claimants' statement on page 4 of their brief, they say "The thimble and swivel were connected to a *bridle made of 5/8 or 7/8 inch steel cable,*" although on page 18 of their brief they state that the bridle was of "a 5/6 inch or a 7/8 inch steel cable." Both statements are partly incorrect. The bridle was constructed of *3/4* inch or 7/8 inch steel cable as shown by the portions of the record cited by claimants on page 18 of their brief

(Figari, 157, 158; Westman, 156; Davis, 179; Lingenfelter, 396).

Again in the portion of their brief under consideration, claimants on page 6 state that they were "three or four feet from the towing hawser", whereas claimant Carlsen's own admission placed him as *two* or *three* feet from the hawser (Carlsen, 325), and claimants' witness Reid placed claimant Sauder as "sitting underneath the tow line" which was "swinging either over Sauder's head or behind his head, but a few inches away" (Reid, 388).

The statement of the character of claimants' injuries, on page 6 of their brief, while in the record, is not properly to be considered here, because under the established practice in limitation proceedings, such facts would be for the determination of the Commissioner upon the proof of claims (loss) in case of a reference.

Benedict on Admiralty (4th Ed.), Sec. 551, p. 378.

Notwithstanding the clearly established and undisputed fact that claimants were transported without compensation either from them or their employer, Healy-Tibbitts Construction Company, and that their transportation was not by virtue of any contractual obligation of any character, claimants in the stating portion of their brief (pages 8 and 9) advance the argument that they were "passengers". They attempt to support this contention by citation

to the English Shipping Act and a headnote from *The New World,* 16 How. 467, 14 L. Ed. 1019, which headnote does not accurately state the holding of the Supreme Court in the case.

In *The New World, supra,* libellant claimed compensation for injuries sustained from a boiler explosion aboard a steamboat on the Sacramento River. The following portion of the opinion of the court shows the particular circumstances of that case:

> "The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such boats, to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board of this boat; and just before she sailed from Sacramento he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board."

The basis of the opinion clearly appears to be an established custom. Continuing from the opinion:

> "It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment tends to render that employment more desirable, and of course, to enable the employer more easily and cheaply to obtain men to supply his wants."

Again:

> "But different employments may and do have different usages, and consequently, confer on the master different powers. And when, as in this case, a usage appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we are of opinion that the master has power to act under it and bind the owner".
>
> "The appellee must be deemed to have been lawfully on board under this general custom".
>
> "Whether precisely the same obligation in all respects on the part of the master and owners and their boats existed in his case, as in that of an ordinary passenger paying fare, we do not find it necessary to determine".

It is patent that upon no construction of the holding in *"The New World"* can claimants be held to have been passengers on the "Three Sisters".

It is not not necessary to go to any law outside that of our own Federal courts to find the rule of decision fixing the status of claimants aboard the "Three Sisters" as that of non-possengers.

In *The Downer,* 171 Fed. 571 (D. C. N. Y.), a ship carpenter employed on a steamer, while being taken by a tug to New York after the completion of his work on the steamer, was injured. The court there in passing upon the contention that the carpenter was a "passenger", said:

> "The theory on the part of the libellant is that being a passenger, he was entitled to all the care that a passenger is ordinarily entitled to. The difficulty with that contention is that the relation of passenger and carrier has not been established. If the libellant had remained

on the Georgic and received injuries there, it would scarcely be urged that he had a passenger's right. He was an employe of the White Star Line, which furnished him with an ordinarily safe place to work and when he was transferred to the Downer, he was still such an employe and was being transported from his work back to New York, also in an ordinarily safe place.

It is said in 5 *Cyc.* 486 that:

'A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to payment of fare, or that which is accepted as an equivalent therefor.'

There was no suggestion here of a contract of any description to pay a fare of any kind to the tug for the transportation. The tug's general business was that of towage, or work of that character. She was hired by the hour to perform such service of the kind as the White Star Company might require and in the course of this employment, she was directed to transport the libellant and his fellow workmen from the Georgic to the pier. There was no contractual relation between the libellant and the tug. The only contract in which the tug entered was the one mentioned, under which she was directed by her employer to transfer the men to the pier. It seems quite evident that the libellant was not entitled to the care which should be given to passengers."

In *The Vueltabajo*, 163 Fed. 594 (S. D. Ala. 1908), in holding that an employee of the owner of a vessel who was being transported to the place where he was to work was not a passenger said:

> "A 'passenger' is one who travels in a public conveyance by virtue of a contract, express or implied, with the carrier, as a payment of fare or something accepted as an equivalent therefor. Black's Law Dict. title 'passenger'; 5 Am. & Eng. Encyc. of Law (22nd Ed.), 486; Thompson on Car., p. 26; Pa. R. Co. v. Price, 96 Pa. 267. While libellant was a passenger, in the sense that he was a traveler being carried from one place to another he was not a passenger, in the legal sense of the term, and entitled to all the accommodations, rights, and privileges as such. He was not being carried by the steamer by any contractual relations with her as a common carrier."

Aside from the English Merchant Shipping Act and the misleading headnote above considered, claimants cite under a "See also" heading, three cases whose lack of application to the question is so patent that no extended comment on them is necessary.

1. *Re Calif. Nav. & Imp. Co.*, 110 Fed. 670 (N. D. Calif.), was a case of injury to a person traveling on a *common carrier* upon a *free pass.*

2. *Steam Dredge No. 1,* 122 Fed. 679, involved an injury to a government inspector whose duties *required* him to be aboard.

3. *The Wasco,* 53 Fed. 546, arose from an injury by a *common carrier,* to a passenger who had *paid a fare* for part of his journey but who continued on past his destination under the implied obligation to pay his fare arising from the customary cash collection in such cases.

It is submitted that the employees of Healey-Tibbitts Construction Co. (including claimants) who were as a matter of accommodation being transported from Point Reyes to San Francisco after the completion of their work, without any consideration moving to petitioner either from them or their employer, were not passengers.

II. ARGUMENT.

Owing to the nature of this proceeding there are two issues here presented, i. e., the issue of fault and the issue of limitation.

A. THE ISSUE OF FAULT.

I. Negligence.

(a) The Burden of Proving Negligence Is Upon Claimants.

The 84-H, 296 Fed. 427;
Benedict on Admiralty (4th Ed.), Sec. 526, p. 355.

(b) Petitioner Was Not Negligent.

Let us see what duty the vessel, her owner and master owed to the claimants.

If the claimants came aboard at the express or implied invitation of the petitioner or the master, the measure of our duty was the *exercise of ordinary care.* But if, on the other hand, the claimants came aboard upon their own insistence, and could be held to be mere licensees, we were only bound to *refrain from wilfully and wantonly injuring them.*

> "As a general rule those in charge of a vessel are bound to exercise ordinary care to avoid injuring persons who are rightfully on or about the vessel by express or implied invitation, and hence the vessel and her owners are liable for injuries caused to persons, who are on the vessel by express or implied invitation, by reason of their negligence or of that of the master or the crew, as by dangerous or defective conditions or appliances; but they do not owe such duty to trespassers or mere licensees, as such persons enter upon the vessel at their own risk, and the vessel is bound to refrain only from wilfully and wantonly injuring them."
>
> 36 *Cyc.* 172.

It is not contended by claimants that petitioner wilfully or wantonly injured them, so that if under the evidence claimants are held to be mere licensees they are without a remedy.

Claimants allege in their answers to the petition that their injuries resulted from *one specific act of negligence,* to-wit, the use by petitioner of an "unsound, rotten and defective" tow-rope and bridle, and at the trial claimants directed the greater part of their efforts to the proof of that *one specific act.* Now, in argument, they point out other claimed acts of negligence on the part of petitioner (such other acts, however, not being within the issues framed by the pleadings) and insist that because of such other acts of negligence petitioner is liable.

We are aware of the rule in Courts of Admiralty regarding variance and departure in pleading. Although we believe that the charged acts of negli-

gence other than those upon which issue is joined in the pleadings cannot be relied upon here by claimants even under the liberal rule of decision announced in the cases of *Dupont v. Vance,* 19 How. 162, 15 L. Ed. 584, and *The Gazelle,* 128 U. S. 474, 32 L. Ed. 496; nevertheless, the proof in the record is so palpably insufficient to establish these non-pleaded acts of negligence that we are meeting claimants' contention regarding them with full confidence that the question of whether or not they may be properly considered under the state of the pleadings will never arise.

We will first consider the evidence in the record as to *the one specific act of negligence pleaded by claimants,* and then consider the "divers" other claimed acts of negligence outside the allegations of claimants' answers.

Claimants alleged, and sought primarily to prove upon the trial, that the petitioner used a rotten, unsound and defective tow-line and bridle. For the purpose of analysis, we will separately consider the evidence as to the condition of the tow-line and the evidence as to the condition of the bridle.

We submit that there is no evidence in the record to sustain claimants' contention that the tow-line was "rotten, unsound and defective." The only evidence adduced by claimants tending to show any characteristics of the hawser used was the testimony of claimant Carlsen and claimants' witnesses Haney, Reid and Evans (members of the pile-driver

crew of which Carlsen was foreman) as to the length of the line from the mast of the "Three Sisters" to the barge under tow. This testimony purports to establish the length of the tow-line out during the tow, but there is no evidence that the line was either rotten, unsound or defective. The fact that this line did not break on either the upgoing or return voyage establishes its sound character beyond question. It is contended by claimants that the length of the line, as fixed by the conjectures of the pile-driver men aboard, shows the line to have been "too short" (Appellant's Brief, p. 71). An examination of claimants' evidence on this point shows it to be of a most untrustworthy character.

Claimant Carlsen, with the assistance of a leading question from his counsel, fixed "the distance between the barge and the tugboat, including the bridle and the rope" at 180 feet.

The following testimony of claimant Carlsen shows that he never in fact observed the distance between the tug and the tow:

> "Q. Was the barge sheering from side to side?
> A. I did not take any notice of that.
> Q. You did not take any notice of that?
> A. No.
> Q. You did not notice the barge at all?
> A. Not after he got outside with it, no. I left all that to the Captain" (324).

Carlsen's testimony was of such an unreliable character throughout that his manner of testifying

can readily be visualized from certain incidents in his testimony which will now be considered.

His testimony as a whole shows him to be a very keen minded witness, ready with his answers, and free with such voluntary statements as to his mind would color his testimony favorably. He detailed on the stand not only what claimants urge as the *res gestae* facts here, but supplied minor incidents, particulars and measurements in his testimony in a remarkable although not in a convincing way.

He testified that the Captain came aft, sat on the hatch and cleaned some fish, and that at that time Scotty Evans was steering the boat (295).

The following is his testimony on this point on cross-examination:

"Q. Did someone tell you that Scotty Evans had steered the boat for a while?

A. No.

Q. Or did you see him yourself?

A. I seen him myself. I seen him in the pilot house myself.

Q. Where were you when you saw him in the pilot house?

A. I was back of the starboard side, back of the engine house some place.

Q. *And you mean to tell us that you could tell that he was steering or had his hand on that wheel?*

A. *Absolutely.*

Q. You were flat on the deck, were you?

A. How is that?

Q. You were standing on the deck were you?

A. Yes, sir.

Q. Do you remember that the galley is between the after-part of the pilot house and the wheel house?

A. Yes, sir.

Q. And you think that that wheel is in a position where you could see from the deck by the engine house?

A. Yes, sir'' (333, 334).

This testimony is proven untrue by the physical impossibility of Carlsen seeing the wheel where the galley completely obstructed his view, and this fact could not escape the observation of Judge Partridge upon his inspection of the vessel. The impossibility of his seeing the wheel from any position aft of the house is plainly shown by the other evidence in the record, not to mention Carlsen's own admission as to the position of the galley, contained in the foregoing testimony.

Again, Carlsen testified that while at a point back of the engine house he saw ''one fellow in the galley shaving himself'' and ''over the sink wherever that was.'' But when his attention was directed to the impossibility of his seeing the man shaving before the mirror in the galley he volunteered the astounding information that the man had a hand-mirror in his hand (309, 310). Then he testified:

''Q. So you saw him with a hand-mirror in his hand in the galley, and you saw that from where you were in the rear, did you?

A. I did.

Q. And you are sure of that are you?

A. Yes, I was standing up at that time'' (310).

To see a man shaving in the galley either before the large mirror in the galley on the port side, or at any place in the galley with the readily invented "hand-mirror", Carlsen would have had to have seen him through the after wall of the galley, as well as through seven to ten mattresses piled on top of the skylight of the engine room (Carlsen 307, Haney 260, 261, Kruger 86, 87, Carlsen 274).

Notwithstanding the particularity of Carlsen's testimony otherwise, he persistently maintained throughout the trial that he did not remember anything about playing cards (277, 306, 326, 327) although he pointed out to the court at the time when testimony was taken aboard ship the exact position where each of the four card players sat (276, 277).

Claimants' witness Owen Haney, testified that the greatest distance that separated the tug and tow was 200 feet "at the outside" (255), but his testimony is to be viewed as that of a man testifying for two injured members of his own crew, and his estimate was obviously no more than a mere guess arrived at after discussing the question with claimant's other witnesses (259).

The testimony of claimants' witness George Reid on the question of the distance between the tug and the tow, is in part as follows:

> "Q. Did you notice the distance that separated the barge from the 'Three Sisters' at any time during this journey?

A. Well that is pretty hard for me to say.

Q. Did you notice the distance, did you notice the barge at any time, did you look back toward the barge?

A. Every once in a while, yes, we would give her the once over, when she bounced around.

Q. What would you say was the extreme distance at any time that separated the barge from the 'Three Sisters', just give us your best estimate?

A. Well, I do not know; I am a poor estimator. It might be 150 feet, it might be 175 feet, for all I know" (368).

At this point Mr. Heidelberg for claimants, over the objection of petitioner, put the following leading question to the witness:

"Q. You would say that the extreme distance was not to exceed 175 feet, in your opinion?" (369).

to which the witness gave the following worthless answer, which becomes significant when we consider the various estimates of the other pile-driver men:

"A. Well, that is pretty hard to say, *some say 175, some say 200, some say 180.* I was just giving you my estimate about it. I would not say 'Yes', and I would not say 'No' " (369).

Claimants' witness Philip Evans, testified in response to a question from the court as to the length of the line out, as follows:

"Somewhere close on to 200, as near as I can judge; there maybe a little more or a little less, *I don't know*" (343).

Opposed to this purely conjectural testimony adduced by claimants we have:

1. The testimony of Captain Kruger that the line out was from 450 to 500 feet long (93, 94).

2. The testimony of deck-hand Anderson (an able seaman) that the line was about 400 feet long (167).

3. The testimony of port engineer Davis that the hawser put aboard the "Three Sisters" was between 500 and 600 feet in length (179) and was the same hawser that was used to tow the barge up to Point Reyes, and

4. The testimony of former port engineer Carlton that the hawser used on the up-going voyage was between 90 and 100 fathoms in length (353).

We have the further and uncontradicted fact to consider, that the entire identical towing rig (hawser and bridle) used on the return voyage was employed in towing the same barge up to Point Reyes in a heavy sea, with two tugs pulling upon the rig part of the way, some thirty days before the accident (78, 79, 80, 81).

The testimony on behalf of claimants as to the condition of the bridle may be summarized as follows:

Claimants' witness Urquhart, testified that the wire cable in the bridle was rusty and that the swivel was frozen with rust (46 and fol.). On cross-examination he testified that such was the condition of the bridle before the up-going voyage at pier No. 46 (48, 49).

Inasmuch as Urquhart, on the taking of his deposition over four months before the trial, testified to conditions of the sea at the time of the accident (50, 51) which were not only disproved by claimants' witnesses Haney (262, 263) and Reid (376) but which were proven impossible of existence under the conditions of course, wind and wave established without material dispute at the trial (97, 98, 397, 169); and inasmuch as his testimony as to the condition of the swivel of the bridle is inherently improbable in view of its mechanical construction (Claimants' Ex. A) and the actual successful use of the bridle in making other tows after his first claimed examination (78, 79, 80, 81, 105, 112), it requires no argument to justify the action of the District Court in ignoring his testimony. *It is difficult indeed to believe any of the testimony of Urquhart when it is remembered that he testified that water was coming aboard the "Three Sisters" by the bow when she was on a course East by South, Half South, with the wind and sea on her starboard quarter.*

Claimants' witness Reid (one of the card players) testified that the bridle was rusty and that there were a few broken strands in the bridle "where it was made fast to the shackle there" (366), but when required on cross-examination to point on the specific portion of the bridle where the strands were broken, indicated a spot where claimants' evidence itself shows that the line did not part. Inasmuch as

claimants argue that the trial court misapprehended the facts of the testimony on this point (Claimants' Brief, p. 48), we are setting forth Reid's conflicting testimony at length:

> "Mr. LILLICK. Q. Mr. Reid, when you testified the other day in commenting upon the strands that you said were broken, you said there were a few around there where it was made fast to the shackle, there, or whatever it is. What did you mean by that, what portion of the bridle?
>
> A. Up a little ways from the splice, there.
>
> Q. Do you mean near the swivel?
>
> A. No, up this way, up around in here.
>
> Q. So it was some distance back of the splice that was nearest the swivel?
>
> A. Yes.
>
> The COURT. Q. *But that is not where it broke, at all, was it? I think the evidence is that one of the breaks was a very short distance from the thimble and the other one was back nearer the bitt*" (380, 381).

It should be borne in mind that in giving the above testimony the witness was illustrating his statements by reference to a towing bridle which was in court before him.

In order to settle any argument about the court not fully understanding the evidence on this point, we are setting forth the testimony of claimants' witness Haney as to where the breaks occurred:

> "Q. Where did the bridle break?
>
> A. One of them broke at the thimble and the other broke at the other extreme end, where she goes over the bitt.
>
> The COURT. Q. *Do you mean at the bitt?*

A. Yes; one broke at the thimble and the other broke at the other extreme end, where she goes over at the bitt'' (258).

It is apparent that Reid never in fact observed any broken strands in the bridle, and that his testimony as to observation of broken strands is a rank invention, for on the first question asked him on cross-examination he absolutely contradicted himself as to where the broken strands were located.

"Mr. LILLICK. Q. When you saw the strands of the bridle broken, were the strands that you saw that were broken near the loop that went over the bitt?

A. Well, no, just the end of the splice, the end of the splice that went over the bitt.

The COURT. Q. *Do you mean the end of the thimble?*

A. No, the end of the splice, your Honor, right here'' (371).

To make his testimony further incomprehensible, Reid proceeded to give his idea of where the breaks actually occurred:

"Q. Where was it broken?

A. About a foot or so from the swivel, there, and about, well, I would not say whether it was 2 feet or a dozen feet, or a million feet, or at all, but it was broke somewhere near the eye of the other bitt. I do not know whether it was on the starboard side or the port-side, but it was on one side'' (372).

Then came the following:

"Q. How long was the bridle on each side after it was broken, giving your measurement from the side to which it was attached?

A. That is pretty hard to say, too, *it might be about six feet, and it might be ten feet;* I could not tell you, though.

Q. That is one side; on the other side how far would you say?

A. *Probably five feet"* (372, 373).

In this connection it should be borne in mind that the entire length of the bridle was about 70 feet, each leg being approximately 35 feet in length (150, 179).

The foregoing is the evidence on which claimants asked the District Court to find that petitioner used a "rotten, unsound and defective" bridle. It is submitted that it did not even constitute a believable prima facie showing, much less did it furnish a basis for sustaining the burden of proof of petitioner's alleged negligence.

In opposition to this showing we have the following evidence:

First, the testimony of former port engineer Carlton that the bridle on the up-going voyage was in good condition, with the swivel turning freely (354, 355).

Second, the testimony of port engineer Davis that when the vessel went up to Point Reyes to bring back the barge the bridle was in good condition and the swivel was turning freely (179, 180, 187, 193, 194, 195, 199).

Third, the type of construction and the mechanical operation of the swivel showed it to have a

free pin with two bearing surfaces, both of which must rust to make it incapable of turning freely (Figari 157, 158, 159, 249, 250, Westman 150, 151).

Fourth, the testimony of Walter Westman, superintendent of the ship yard of Crowley Launch & Tugboat Company, that he had never seen one of Crowley's swivels frozen with rust (150).

Fifth, the fact that the bridle was used under severe conditions on the up-going voyage (two tugs pulled upon it part of the way) and on one tow made between the up voyage and the down voyage (Kruger 78, 79, 80, 81, 105, 112).

Sixth, the circumstances that bridles of this character are exclusive equipment with Crowley Launch & Tugboat Company (Westman 150).

Seventh, the fact that they were used by Crowley's for both outside and inside towing (Westman 152).

Eighth, the fact tht Captain Mohr had used bridles of this type in making similar tows (Mohr 394 and 395).

Ninth, the fact that the bridle was taken from one of the large boats of Crowley's and had been in service up to the time it was taken (Figari 157 and 248).

Tenth, the fact that the entire towing apparatus employed on the voyage was pronounced safe and proper by the only expert called (Mohr 395, 396 and 397).

Claimants devote over ten pages of their brief to argument in support of their contention that port engineer Davis did not in fact examine the bridle and swivel before the "Three Sisters" went to Point Reyes to bring back the barge. Claimants urge that Davis' testimony was based upon inference and not actual recollection. This contention is untenable in view of the unequivocal and repeated statements of the witness that he did in fact make the inspection in question.

In the first place, it should be borne in mind that the initial statement made by Davis as to his inspection of the swivel was made in response to a question from the court:

> "The COURT. Did you examine the swivel?
> A. Yes, sir, that is part of my duty.
> Q. Was the swivel moved?
> A. Yes, sir.
> Q. It was not frozen in any way?
> A. No, sir. If it was I would have noticed it" (179, 180).

The cross-examination of Davis opened with an attempt on the part of claimants to discredit the witness by confusing him on various dates of occurrences happening over a year before he took the stand. A greater part of the criticism of the testimony of Davis set forth in claimants' brief is directed toward what Davis was unable to remember in point of time. It is submitted, that inasmuch as it is only an exceptionally mentally gifted man who is able to place dates after the lapse of a year with

any degree of accuracy, that the circumstance that Davis was unable to supply specific dates is a circumstance which, of itself, should point to the absolute integrity of his testimony. The manner of cross-examination of Davis indulged in constantly by claimants' proctor is well illustrated by the following excerpt from the cross-examination:

> "Q. You do not remember the date when you entered the employ of A. Paladini, Inc.?
> A. I do not.
> Q. Yet you remember you made a thorough inspection of the tow line and the bridle used in this particular voyage?
> A. Yes, sir.
> Q. You do?
> A. Yes, sir" (186, 187).

The manifest unfairness in the manner of cross-examination was apparently recognized by the court when the following question was asked:

> "Q. Don't you remember that you never saw this swivel before January 8, 1923?
> The COURT. I think he might be confused about the dates, there. Let me put the question to him in this way:
> Q. You remember the day the accident happened, that is, you remember that an accident happened, don't you?
> A. Yes.
> Q. The 'Three Sisters' came back to port with two wounded men?
> A. Yes.
> Q. A few days before that you testified that you sent the 'Three Sisters' up to bring back the barge?
> A. Yes.

Q. Did you examine the bridle just before she went up on that last trip to bring back the barge?

A. Yes, sir.

Mr. HEIDELBERG. Q. You know you did that and yet you don't know when you became Port Engineer for A. Paladini & Company; you don't know that, do you?

A. The exact date, no" (197, 198).

The court not only had an opportunity to closely observe Davis' manner of testifying in response to questions from counsel, but the court addressed several questions to the witness personally.

In his opinion in this case Judge Partridge said:

"The evidence in regard to the condition of the bridle and the length of the hawser is conflicting. I am satisfied, however, that the bridle was subjected to a proper inspection" (474).

Surely after Judge Partridge personally heard the testimony of claimants' witness Reid, the deposition of claimants' witness Urquhart, and the opposing testimony of Davis as to the condition of the bridle, and after he decided on this conflict in favor of the testimony of Davis, this court cannot be seriously asked to reverse the District Court in this respect.

With deference, we submit that the following reasoning of the Supreme Court in the case of *The Steam Tug Quickstep,* 9 Wall. 665, 19 L. Ed. 767, should be controlling here:

"The Court that can see the witnesses, hear their statements, observe their demeanor, and

> compare their degree of intelligence, is better able than an appellate tribunal to reconcile differences in testimony, or if that be not possible, to ascertain the real nature of the transaction."

We would also refer to the case of *Monongahela River, etc. Co. v. Schinnerer,* 196 Fed. 375 (C. C. A. 6, 1912), where in the opinion of the court is found the following:

> "There is, however, a sharp conflict as to the facts alleged to constitute respondent's negligence; and although we here consider the testimony de novo, we do this in recognition of the rule stated by Judge (now Mr. Justice) Lurton, in City of Cleveland v. Chisholm, 90 Fed. 431, 434, 33 C. C. A. 157, 160, that:
>
> 'The judgment of the District Court will not be reversed when the result depends alone upon questions of fact depending upon conflicting evidence, unless there is a decided preponderance against the judgment, where the trial judge saw and heard the witnesses, and had an opportunity of weighing their intelligence and candor.' "

In seeking to reverse the findings of the District Court on the question of the inspection of the bridle, claimants are asking this court to accept the testimony of Urquhart, a witness whose testimony, as has heretofore been pointed out, is not only inherently improbable but totally unbelievable in view of the proven falsity of a material portion of his testimony. There is no question but that it must either be decided that Davis was correct when he said the swivel was turning freely or Urquhart was right when he said that it was frozen with rust.

We will now consider briefly the acts of negligence charged by claimants but which are not pleaded in their answers. Replying to the specifications of negligence set forth on pages 70, 71 and 72 of claimants' brief:

(a) It is true that "neither Master nor deckhand of the 'Three Sisters' ever inspected the towing equipment". Petitioner had delegated that duty of inspection to its Port Engineer, who, according to his testimony and the decision of the District Court, made the proper inspection.

(b) It is admitted that "no one inspected the towing equipment at Point Reyes before the commencement of the voyage on which the injuries were sustained." The inspection was made at the home port of San Francisco immediately before the "Three Sisters" left to bring the barge back, which inspection is certainly reasonably sufficient when one considers the relatively short distance from the home port to Point Reyes.

(c) It is *not true* "that no one inspected the towing equipment before the commencement of the voyage to Point Reyes." If this assignment refers to the up voyage in May, 1923, it is immaterial, because the towing equipment was proven sufficient by the success of that voyage under severe conditions in a heavy sea. If this assignment refers to the voyage when the "Three Sisters" went up to get the barge, it is answered by our reply to (b) *supra.*

(d) The Master *did* manipulate his engines to keep the tow safe. He had a new engine which could not be run at full speed (Kruger 124), and which he slowed down to half speed when the "Three Sisters" encountered the ground swells (Kruger 99, 124).

(e) The Master of the "Three Sisters" did not tow with too short a tow-line (see pages 11 to 17, inclusive, of this brief).

(f) Port Engineer Carlton's competency is not at issue here. Port Engineer Davis, who was the Port Engineer of petitioner for some time prior to and at the time of the accident, was competent. There is nothing in the record showing him to be incompetent. He was a licensed man (463, 464, 465, 466), and had wide experience as his testimony satisfactorily shows (177, 186, 187, 188, 189). Captain Kruger was a competent master of the "Three Sisters". He was thirty-one years of age at the time of the trial (69), had been on the water since he was fourteen years old (70), was licensed as a launch operator in 1917 (70), and had had continuous experience from 1917 to the time of the accident as master of various craft similar to the "Three Sisters", plying upon the Pacific Ocean (71, 72, 73). He had had adequate towing experience upon, and was fully familiar with, the waters where the accident occurred (72, 73). Deckhand Anderson was more than competent to fill the position of deckhand upon a launch such as the "Three

Sisters''. He was an able seaman (170), had been at sea seven years (174), had been on transports, oil tankers and gasoline schooners, and had been quartermaster on the ''Madrona'' and the ''Nevada'' and had taken his turn at the wheel (174).

(g) The Master of the ''Three Sisters'' *was not negligent* in failing to *order* injured claimants away from the hawser and not *enforcing such order.* These claimants were not passengers. Claimant Carlsen had been a sailor for four or five years. Claimant Sauder was a pile-driver man. Neither could be properly termed landsmen. The Captain *warned* them to keep clear of the line. Considering claimants' status aboard, that was certainly sufficient, as petitioner was only legally bound to refrain from wilfully or wantonly injuring them, or at most, to exercise ordinary care and diligence in conducting the towing operation while they were aboard. The cases cited by claimants on this point are all *passenger cases* except *The Steam Dredge No. 1,* 122 Fed. 685, which was a case of a government inspector injured by a risk *not fully within his knoweldge* where the vessel had the *last clear chance* to avoid the accident.

Claimants urged in the District Court and now contend, that because petitioner was not able to produce the swivel with the two broken pieces of cable upon claimants' demand at the trial over a year after the accident, that an unfavorable inference should be made against petitioner. This contention is based only upon the circumstance that in a visit

by claimants' proctor Mr. McShane upon his old acquaintance, Alexander Paladini, Mr. McShane testified that he asked Mr. Paladini "what he was going to do with reference to these men". Mr. McShane admitted that he did not tell Mr. Paladini that he was going to commence suit and that the conversation after his inquiry became purely social (McShane 433, 434). In view of the fact that workmen's compensation was secured for the injured men and the presence of the insurer here as a claimant, we submit, without any reflection upon the testimony of Mr. McShane, that Mr. Paladini's testimony as to Mr. McShane's visit is entirely reasonable (Paladini, 240, 426, 427, 428, 429, 430). The claimed inference was not drawn by the District Court for the obvious reason that there was nothing in the evidence to support it.

We respectfully submit that as claimants failed to prove that petitioner was in anywise negligent in using the line and bridle employed on the voyage, and as there was consequently no liability on the part of petitioner to limit, that the decree of the District Court denying liability *in toto* was the only decree that could be properly entered under the evidence, and that it should not be disturbed.

(c) The Rule of Res Ipsa Loquitur.

Claimants, having failed at the trial in proving the negligence specifically charged in their answers now say, in effect, "Well, at any rate, the thing speaks for itself" *(res ipsa loquitur)*. Having failed

to sustain their burden of proof by any reliable quantum, much less a preponderance, of the evidence, claimants now fall back upon the weakest makeshift in the law as a substitute for proof—the presumption of fault from the circumstances of the mishap, the doctrine of *res ipsa loquitur.*

To sustain claimants' position they cite in their brief a great many cases. Some of them are true applications of the rule of *res ipsa loquitur.* Some illustrate the doctrine of inevitable accident. But the cases illustrating the doctrines of *res ipsa loquitur* and inevitable accident, are mixed indiscriminately with cases involving unseaworthiness under contracts of charter, affreightment and of towage which are entirely unrelated to tort cases of the present character, and particularly unrelated to one with the peculiar facts of the case at bar.

For the present we will confine our attention to the consideration of the doctrine of *res ipsa loquitur.*

1. Statement of and Reason for the Rule of Res Ipsa Loquitur.

The Rambler, 290 Fed. 791 (C. C. A. 2-1923), was a case where a decree denying the right of limitation was reversed. The court there said, regarding the rule of *res ipsa loquitur,* that it had nothing to add to what is said in *Central Railroad Co. v. Peluso,* 286 Fed. 661. We therefore set forth here so much of the opinion in *Central Railroad Co. v. Peluso, supra,* as is pertinent to the present discussion:

> "At the outset, it is desirable to clear away some misapprehension of the meaning of res

ipsa loquitur, and this may best be done by quoting from the admirable statement of McLaughlin, J., in Francey v. Rutland R. R. Co., 222 N. Y. 482, 119 N. E. 86:

'The action was tried and submitted to the jury on an erroneous theory as to the application of the rule of res ipsa loquitur. It is not a complicated rule, nor is there difficulty in applying it in a given case, when the reason for its adoption is understood. The phrase usually employed to express the rule, res ipsa loquitur—the thing speaks for itself—may at times tend to obscure rather than to make clear what the rule means. *All that is meant is that the circumstances involved in or connected with an accident are of such an unusual character as to justify, in the absence of any other evidence bearing upon the subject, the inference that the accident was due to the negligence of the one having possession or control of the article or thing which caused the injury.* This inference is not drawn merely because the thing speaks for itself, but because all of the circumstances surrounding the accident are of such a character that unless an explanation be given the only fair and reasonable conclusion is that the accident was due to some omission of defendant's duty.'

Again, as said by Mr. Justice Holmes in Southern Railway v. Bennett, 233 U. S. 80, 85, 34 Sup. Ct. 566, 567 (58 L. Ed. 860):

'Of course, the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticized further as if the Judge had said res ipsa lo-

quitur—which would have been right or wrong according to the res referred to.'

As also said by Mr. Justice Pitney in Sweeney v. Erving, 228 U. S. 233, 238, 33 Sup. Ct. 416, 417 (57 L. Ed. 815, Ann. Cas. 1914D, 905):

'The general rule in actions of negligence is that the mere proof of an "accident" (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, res ipsa loquitur—the thing speaks for itself—that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

The doctrine has been so often invoked to sustain the refusal by trial courts to nonsuit the plaintiff or direct the verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof.' "

We submit from the following that the rule requires the concurrence of two elements:

1. Exclusive control of all the instrumentalities of injury by the defendant.

2. Circumstances which allow *only* the conclusion of defendant's fault in the absence of an explanation.

Professor Wigmore says of the rule:

> "But the following considerations ought to limit it: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected except from a careless construction, inspection or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured."

And as the *reason for the rule,* Wigmore states:

> "It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consist in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."
>
> *Wigmore on Evidence* (both editions), Sec. 2509.

This court pointed out in *The Great Northern,* 251 Fed. 826, at p. 829 of the Reporter, that the presumption does not arise from the fact of injury, but from *the circumstances of the happening.*

2. The Rule of Res Ipsa Loquitur Is Not Applicable.

In applying the rule of *res ipsa loquitur* to the case at bar we find that the first requisite of application, i. e., that of exclusive control, is admittedly present, but that the second indispensable element, viz., *circumstances which allow only the conclusion*

of fault in the absence of an explanation, is totally lacking.

Let us set forth those circumstances of the accident which "speak" of its character:

1. *The Vessel*—"Three Sisters", 135 H. P. Deisel Launch—length 56.3/10 ft., breadth 15.6/10 ft., depth 6 ft.

2. *Her Crew*—A licensed Launch Captain of experience, and a deck-hand who was an able seaman.

3. *The Voyage*—From Point Reyes to San Francisco, under tow.

4. *The Tow*—Crowley's Barge No. 61 with a pile driver aboard.

5. *The Towing Equipment*—A seven-inch Manila hawser and a 3/4 or 7/8 inch steel bridle of reasonably sufficient length and strength, duly inspected and previously tested.

6. *Course*—E x S 1/2 S.

7. *Wind and Wave*—(a) Wind: Very light northwester, astern. (b) Wave: Heavy westerly swells on the starboard quarter.

As the character of the ground swells is the most important determination controlling the question of whether or not the circumstances of the accident point *only to negligence of petitioner as the cause,* we will now set forth such portions of the testimony of the various witnesses as throw light on this condition of the sea:

"After getting under way there was quite a swell on" (Urquhart, 45).

"On that occasion there was quite a swell running" (Urquhart, 49).

"I was getting some ground swells and the further we got the bigger the ground swells got" (Kruger, 96).

"When she was going ahead, part of the time the line would be in the water, and sometimes it would jump right out as it was running with the sea" (Kruger, 98).

"When we got heavy into ground swells, I slowed down into half speed" (Kruger, 99).

"Q. During all of that time did you ship any water, Captain?

A. No, sir.

The COURT. Q. Where was the wind?

A. A very light northwester. It was right astern of us. There was no choppy sea at all. There was just an ordinary heavy ground swell" (Kruger, 104).

"The COURT. Q. Captain, what was your course coming down?

A. East by South, half South.

Q. And what direction were those swells?

A. We call them westerly swells.

Q. How would they catch you?

A. About on the quarter" (Kruger, 175).

"Q. The vessel did not roll, then, in those swells?

A. She jumped, but it did not roll.

Q. What was the jumping from?

A. They always do in a ground swell" (Haney, 267).

"Q. There was a swell, wasn't there?

A. Yes, there was a swell coming down.

Q. There was a heavy swell, wasn't there?

A. I don't know what you would call a heavy swell out there.

Q. What do you call a heavy swell, as a sailor man?

A. I have seen some awfully heavy swells. *We had a pretty good swell for a small boat I should judge"* (Carlsen, 323, 324).

"Q. So that it was perfectly smooth and a steady pull?

A. No, sir, it was not perfectly smooth. There was *quite a good ground swell out there.* The boat was going like that, as any boat will. I did not notice any particular jerk at any time though" (Carlsen, 333).

"Q. * * * Did you look back toward the barge?

A. Every once in a while we would give her the once over *when she bounced around"* (Reid, 368).

Under the foregoing condition the accident occurred. Captain Kruger's explanation of the reason for the parting of the bridle follows:

"Q. What is the explanation, if you have any, of the reason for the bridle parting?

A. Well, the way I could explain it is that the barge was at times swinging from one side to the other and going with the sea, and sometimes my boat would go ahead, the 'Three Sisters', and jerk the line when it got between the seas and running with the sea" (98).

Certainly the foregoing circumstances do not indicate "The vessel alone was at fault" or "the bridle parted without any apparent reason" or "when upon a smooth sea under favorable conditions the towing equipment broke", since the evidence shows that the swells were so severe that this small boat slowed down to half speed and even then would run with the sea, jump and jerk the line attached to the barge, which was sheering and

bouncing around. The circumstances of this accident plainly bespeak the force of swells of such a severity that even the action of the Master in slowing down to half speed could not avoid the effect of the sea which swerved the barge from side to side and caused the tug to run and jump with the sea and bring up the line with a jerk. The circumstances of this accident show that this force of the sea caused the breaking of the bridle, as found by the District Court. We respectfully submit that far from "speaking for itself" and indicating that "the circumstances point *only to the vessel's negligence,*" as contended by claimants, this mishap is not only silent as far as establishing *prima facie* negligence is concerned but establishes that the vessel encountered what for a ship of its size was a condition of the sea too forceful to be thwarted by the use of ordinarily reasonable and proper towing equipment and proper navigation.

Captain Mohr, a tow master of experience, testified as follows:

> "Q. Captain, under what circumstances does reasonably proper and safe towing equipment break?
>
> A. *By cross seas, or by a tow, or a launch, or a tug, being in different positions, such as the barge being up in one sea and the tug being down in the other*" (397, 398).

At that point the following related question was propounded by petitioner's proctor:

> "Q. Is it, or is it not the fact that the best and safest possible equipment breaks under such circumstances as you have mentioned?"

Upon the court indicating that the question called for "a matter of pure common sense" and "that the court has sense enough to see that there will be an additional strain if the tow is going down one side of the swell and the tug is coming up on the other side", petitioner's proctor withdrew the question.

Regarding the cases cited by claimants on the doctrine under discussion, we feel, in view of the nature of the rule and its application, as heretofore outlined, that any specific cases saying "negligence will be presumed from the breaking of the hawser" or like expressions, are worthless, inasmuch as each particular case must "speak for itself" according to its own particular facts, and such cases no more than state the admitted rule and apply it to different states of facts existing upon different waters. Such cases must be construed in the light of their peculiar states of facts and should not be considered here, where the question is "what do the particular circumstances of the instant accident say"? Surely it cannot be argued, because some court on the Atlantic seaboard held the breaking of a towing hawser under certain particular conditions of wind and wave upon particular waters, to be *"res ipsa loquitur"*, that, consequently, every broken towing hawser "speaks for

itself", no matter where or under what circumstances the break occurred. The cases cited by claimants merely reiterate the rule appearing in the foregoing authorities and, so considered, they are of some value to this court, but it is respectfully urged that such cases are not to be considered as establishing an arbitrary rule that every broken towing hawser is *res ipsa loquitur,* or as offering any rule for the application of the doctrine in the present case.

We submit from the foregoing that the accident was not *"res ipsa loquitur"* because wholly lacking in the essential element of its circumstances pointing only to negligence as a cause.

By way of analogy, in application of the rule, we cite the leading case of *Duhme v. Hamburg American Packet Company,* 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615. That case shows a state of facts somewhat similar to those in the case at bar. There the plaintiff while upon a dock was injured by the recoil of a hawser which parted while a steamer was being warped to its pier. The plaintiff relied upon the maxim of *res ipsa loquitur,* but the court held the maxim inapplicable, saying:

> "The parting of the hawser did not speak for itself, as imputing negligence to the defendant, and to leave it to jurors to say whether it was the result of negligence would be to invite them to speculate upon possibilities, without any basis in fact. The pier was a safe place had the plaintiff and his mother kept within its shelter and had they heeded the warnings of defend-

ant's servants. The breaking of the shackle was not shown to be due to any defect in its manufacture, or to the omission by any care in handling, and the circumstances disclosed simply permit the natural inference that it yielded to the tremendous strain put upon the hawser in bringing the vessel from the channel into its berth at the pier."

3. Claimants by Their Pleading and Proof in This Proceeding Are Precluded From Invoking the Rule of Res Ipsa Loquitur.

All consideration of the rule of *res ipsa loquitur* is rendered unnecessary here, as, even if the rule would ordinarily be applicable (although petitioner submits it is not so) the claimants have precluded themselves from its benefit by relying, both in *pleading* and *proof* upon *specifically* alleged negligence.

The law on this point is established by this court in *The Great Northern,* supra, where on page 829 of the reporter (251 Fed.), Judge Gilbert said:

> "Again, the general rule is that, where the plaintiff in an action for negligence specifically sets out in full in what the negligence of the defendant consisted, the doctrine of res ipsa loquitur has no application. *Midland Valley R. Co. v. Conner,* 217 Fed. 956, 133 C. C. A. 628, and cases there cited; *White v. Chicago G. W. R. Co.,* 246 Fed. 427, 158 C. C. A. 491."

The case of *Midland Valley R. Co. v. Conner* (C. C. A. 8th Cir. 1914) cited by Judge Gilbert, was an action against a railway for wrongful death of a passenger. The complaint contained five specific allegations of negligence, but no allegations of general negligence. The District

Court instructed the jury that the doctrine of *res ipsa loquitur* was applicable and raised a presumption of negligence on the part of the carrier. The Circuit Court of Appeals held the instruction erroneous basing its decision upon the ground that as the plaintiff pleaded *specific* negligence instead of general negligence the rule of *res ipsa loquitur* has no application. After citing numerous authorities to sustain this position, the court set forth the reason for the holding by saying:

> "'*Res ipsa loquitur*' means 'the thing speaks for itself.' The question is, what does it say? Does it say that from the accident the company has been negligent in every possible way, or does it say that the presumption is that in some way the company has been negligent? Of course, if the first is what it says, that is, the company has been negligent in every conceivable way, then the presumption is that it was negligent in the very way specifically alleged; but if the second is true, if the presumption is that in some way the company has been negligent, then there is no presumption of negligence in any particular way specified, and this is true although, where the presumption exists, the company must show that it was not negligent in any way. The rule that the evidence must correspond with the allegations is as old as the common law, and if the presumption is simply of some negligence that causes the injury, and not a negligence in all things, one who specified the negligence can find nothing in the presumption to sustain the allegation."

The last cited case was followed by the case of *White v. Chicago G. W. R. Co.,* (C. C. A. 8th Cir. 1917) 246 Fed. 427, where the court said:

> "The plaintiff in error claims in substance that the maxim '*res ipsa loquitur*' applies to this case. This might be true if the plaintiff had not set out in full in what the negligence of the defendant consisted, * * *.
>
> Under such circumstances, the maxim in question can have no application. *Midland Valley R. Co. v. Conner,* 217 Fed. 956, 133 C. C. A. 628."

The claimants here have pleaded and directed their proof to the establishment of the employment by petitioner of *"a rotten, unsound and defective" tow line and bridle.* Having done so they must *prove* the specific negligence alleged and the rule of *res ipsa loquitur,* which operates within very restricted limits in aid of a proponent of general negligence, can give them no assistance.

There can be no necessity to "let the thing speak for itself", where claimants have already spoken for it. We are not relying here alone upon such "speaking" as claimants did in their answers to preclude them from invoking the rule, but we are in fairness and reason asserting that, after claimants pleaded the use of "a rotten, unsound and defective" tow line and bridle and after they have "spoken" by the testimony of Carlsen, Evans, Reid, Urquhart, Haney and Woods in attempted establishment of the allegations of their answers, they cannot now say "yes, by pleading and proof we have spoken, but since the District Court did not believe us, let the thing speak for itself". The fact that claimants have "spoken" in vain does not alter

the situation. By speaking "for the thing" claimants have obviated the possibility of "the thing speaking for itself."

(d) Inevitable Accident.

Claimants contend that the doctrine of inevitable accident is applicable to the facts of this case, and that the District Court incorrectly applied that doctrine in its determination in this case. We earnestly urge that (a) the rule is not applicable and that the decree of the District Court is not necessarily based thereon; and (b) that if the rule be considered applicable and the remarks of the District Court in its oral opinion be considered an application of the rule, the rule has been *satisfied by the proofs* and the application (if there was such) by the District Court was correct.

1. Statement of the Doctrine.

In the many cases cited by claimants on this doctrine it appears that the doctrine is peculiarly one of maritime law; that it originally applied only in collision cases but that it has been extended to cover contract and tort cases generally.

Limitations of time and space will not permit us to consider case by case the multitude of cases cited on the doctrine of inevitable accident. We will attempt here only to set forth what we believe to be a fair statement of the doctrine of inevitable accident in view of claimants' cited authorities and to dem-

onstrate that the argument of claimants as to the application of the doctrine is unfounded.

We believe the following to be a statement including the elements of the doctrine of inevitable accident:

> "(1) Where in a maritime cause,
> (2) Negligence is charged of a vessel or her owner,
> (3) in respect of her seaworthiness or proper navigation, and
> (4) the injured party has sustained the burden of proof of negligence either by (a) the production of evidence or (b) proof of circumstances from which the inference of negligence alone would ordinarily follow (*res ipsa loquitur*) and
> (5) the owner has in rebuttal relied upon the inevitable character of the mishap,
> (6) such owner must either (a) point out the cause of the mishap and show that he was in no way negligent in connection with it or
> (b) show all possible causes and negative his fault in connection with every one of them.

2. The Doctrine of Inevitable Accident Is Not Applicable in This Case.

Looking at the facts of the case at bar in the light of the rule of inevitable accident, we find first that claimants have not sustained the burden of proof of the negligence of petitioner which was upon them, it being decreed by the District Court

> "1. That the accident described in the libel and petition herein was not caused by the design or negligence of the petitioner * * *" (478).

Here then we have a specific decree that claimants have not sustained their burden of proof. This burden of proof claimants sought to sustain both by evidence as to the *specific negligence* charged and by reliance upon the *presumption of negligence* from the happening of the mishap. The court in decreeing that the accident was not caused by the negligence of petitioner necessarily decided (1) That the claimants had not sustained their burden of proof of negligence by a preponderance of the evidence and (2) That the accident was not *res ipsa loquitur*.

Accordingly, we submit that claimants have not satisfied one of the first requirements of the doctrine of inevitable accident, viz., that of sustaining by *proof* or *presumption* the *burden of proof* cast upon them; that the decree of the District Court is correct and should be final; and that having failed in satisfying this requisite of the rule, claimants cannot invoke it. It is a plain case of the District Court not being satisfied with the proof of actual negligence and being also satisfied that the circumstances of the accident did not bring the case within the rule of *res ipsa loquitur*.

Our contention regarding the requirement of claimants sustaining their burden of proof before the doctrine of inevitable accident can be called into operation is, we submit, the only method by which the rule regarding the burden of proof in negligence cases can be reconciled with the cases applying the doctrine of inevitable accident.

We further submit that in all the specific instances cited by claimants where the rule of inevitable accident has been applied it has also been held that the accident was either proven to be caused by *actual negligence* or the court held it to be *res ipsa loquitur*.

Inasmuch as the District Court's *decree on the facts* finds that claimants have utterly failed to prove negligence on the part of petitioner, and as the case is not one where negligence can be properly inferred from the accident, there is no basis for the application of the doctrine of inevitable accident.

3. If the Doctrine of Inevitable Accident Be Applied, Nevertheless It Has Been Satisfied.

Even though the doctrine of inevitable accident be considered applicable, claimants cannot gain any advantage because of it, the requirements of the doctrine having been satisfied by petitioner's proof of the cause of the accident and the entire absence of negligence in connection with such cause.

The District Court was satisfied from the evidence that "the real cause of the accident was these ground swells" (473).

In this connection, and answering the argument made on page 23 and elsewhere in claimants' brief, we respectfully submit that there is ample evidence in the record to prove correct the statements in the opinion of the court about the cause of the accident. In this connection, we would refer to pages ..... to ....., inclusive, ante, of this brief, where the acci-

dent and the accompanying conditions of the course, wind, and wave are fully considered. Here we merely repeat the explanation of the accident as given by Captan Kruger:

> "Q. What is the explanation, if any you have, of the reason for the bridle parting?
>
> A. Well, the way I could explain it is that the barge was at times swinging from one side to the other and going with the sea, and sometimes my boat would go ahead, the 'Three Sisters' and jerk the line when it got between the seas and running with the sea" (98).

This explanation conforms substantially with the statement of the court as to the cause of the accident (473, 474); and when considered in connection with the common maritime knowledge of the court and the opinions of the expert Captain Mohr (395, 396, 397, 398) gives a convincing explanation of the accident absolving petitioner from all fault.

(e) Assumption of Risk.

Claimants Assumed All of the Risks Inherent in the Obviously Dangerous Place Aboard Where They Were Playing Cards at the Time of the Accident.

For sometime prior to, and at the time of, the accident claimants Carlsen and Sauder were playing cards (whist) with claimants' witnesses George Reid and Fred Woods at the stern of the "Three Sisters" near the stern grating and between the starboard stern bitt and the hatch. Their respective positions are shown by the following testimony of claimants' witness George Reid:

"Mr. LILLICK. Q. You said the other day that Mr. Sauder was sitting underneath the tow-line. Will you explain that a little more fully, Mr. Reid, where the men were sitting with relation to the tow-line while they were playing cards?

A. Yes. Mr. Sauder was sitting back, with his back to the tow-line.

Q. I am reading to you from your testimony of the other day: (Testimony of George Reid):

'Q. Where do you place the various men who were on the "Three Sisters" belonging to your crew, Carlsen and your crew, where do you place them at the moment that the line broke?

A. Carlsen was sitting on the stern, and I was sitting opposite him. Mr. Sauder was sitting underneath the two-line, and the cook was sitting across from him.'

As I understand that answer, it indicates that Mr. Carlsen was sitting with his back to the stern, on that little grating; you were sitting opposite him; Mr. Sauder was sitting near to the port side and underneath the tow-line, and the cook, or the other man, nearer the rail; is that correct, or isn't it?

A. Yes, that is it.

Q. That tow-line, then, was swinging either over Sauder's head or behind his head, but a few inches away, wasn't it?

A. Yes" (387-388).

"Q. Which of them was nearer the line?

A. Both of them were pretty near the line.

Q. By that, do you mean the cook and Carlsen, or the cook and Sauder?

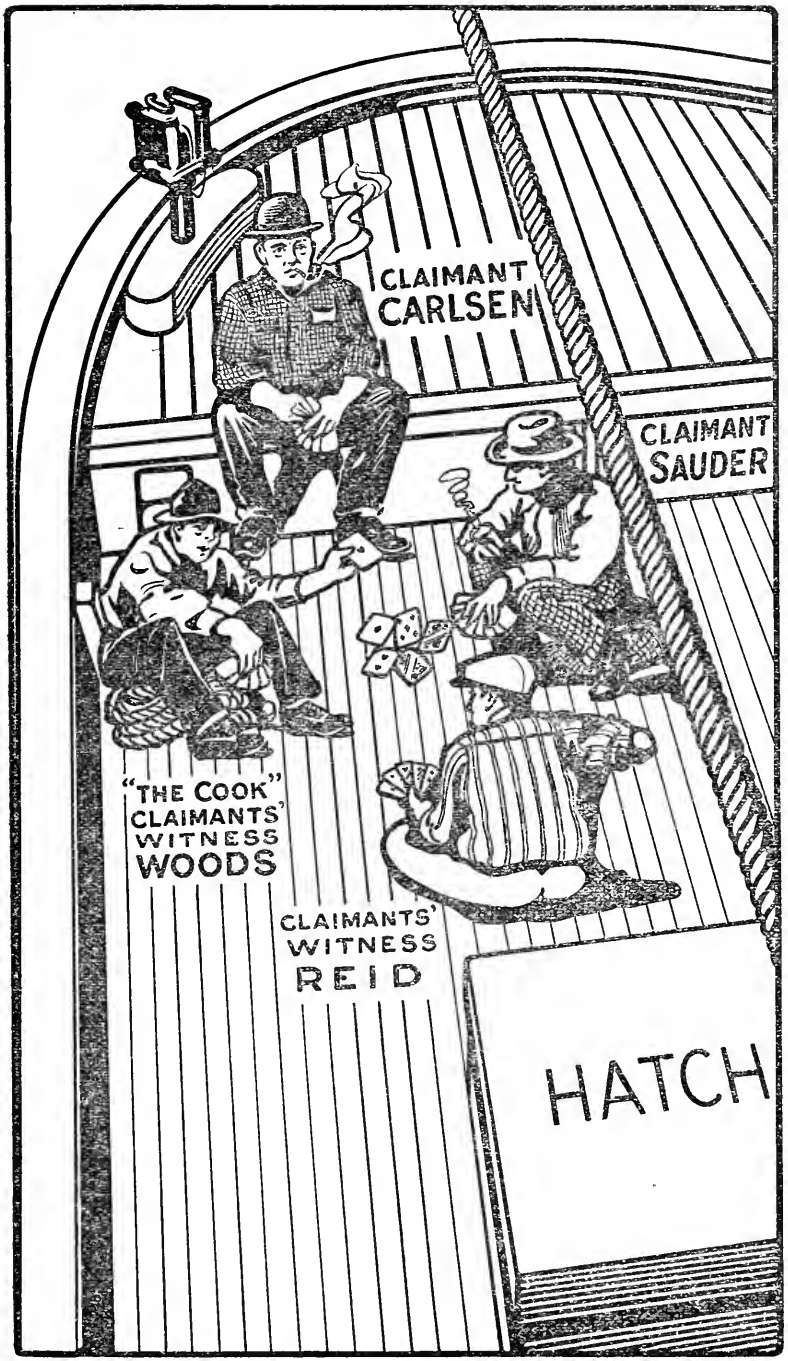
A. Me and Sauder were the closest to the line" (375).

The position of claimant Carlsen is fixed with certainty by his testimony following:

"Q. How close was the tow-line to you when you were sitting down?

A. It was a matter of two or three feet from me, I suppose" (325).

Taking into account the fact that the "Three Sisters" was a vessel of only 15-6/10 feet at her beam; that Carlsen was sitting on the stern grating but two or three feet from the line (325); that the game being played was whist (375), which would require a considerable spreading of the players, and that Sauder and Reid "were closest to the line", it would necessarily follow that claimant Sauder's head was all but touching the line. The following sketch shows the position of the players while playing cards upon the deck of the vessel:


CLAIMANT
CARLSEN
CLAIMANT
SAUDER
"THE COOK"
CLAIMANTS'
WITNESS
WOODS
CLAIMANTS'
WITNESS
REID
HATCH

Claimants argue that the place where the card players were situated at the time of the accident was not in fact dangerous, and to take issue with the statement of Judge Partridge delivered from the bench in his oral opinion that

> "It is not, however, denied that it was a dangerous place, for the reason that the experience of all seafaring men has shown that the vicinity to where a hawser is fastened, when the vessel has another vessel in tow, is a dangerous place" (Claimants' Brief pages 72, 73).

Claimants contend that "There is no evidence whatever that 'the experience of all seafaring men has shown it to be so' ". We submit that when the court informally said "It is not, however, denied that it was a dangerous place" he did not refer to the pleadings but to the proof in which there is not one word to show that the place was not in fact dangerous, claimants in their evidence not rebutting in any wise the showing of the petitioner on that point. We submit further that the statement of the court that the place was dangerous according to the knowledge of all seafaring men, is not only a fact of common knowledge of which this court as a court of admiralty will take cognizance, but that the seafaring men among claimants' witnesses, as well as the only expert called at the trial, established beyond dispute that Judge Partridge's statement in that behalf is correct. Here follows the testimony of claimants' witness Owen Haney:

> "Q. Why didn't you stay on the rear deck?
> A. Why didn't I?

Q. Yes.

A. Because I wanted to talk to the fellow in the pilot-house, maybe; I just happened to walk up there.

Q. Did you not appreciate that there was some danger from that tow-line?

Mr. HEIDELBERG. That is objected to as being immaterial, irrelevant and incompetent.

The COURT. Objection overruled.

A. *Well, there is always danger"* (263, 264).

Captain Mohr merely repeated the common maritime knowledge on the subject when he testified:

"Q. Do you regard the stern of the tug under tow as being a safe and proper place for a man to be with a view to his personal safety?

Mr. HEIDELBERG. Objected to as immaterial, irrelevant and incompetent.

The COURT. Let him answer.

A. *No, sir"* (398).

It is strange indeed that claimants should now deny that the stern of the "Three Sisters" was in fact dangerous in view of the implied admission of claimants contained in the following question by claimants' proctor Mr. Heidelberg, and the following answer by claimants' witness Philip Evans:

"Q. Of course, you knew afterwards, when the tow line broke and snapped back, you know now that that part of the boat was dangerous?

A. Yes" (352).

Immediately after this question and answer we find in the record the following:

Recross Examination.

"Mr. LILLICK. Q. Mr. Evans you knew it was a dangerous place before, didn't you?

A. *Well, that is the rule.*

Q. That is the dangerous part of the boat when they are towing, isn't it?

A. *As a rule, yes*" (352).

The following is taken from the cross-examination of claimants' witness, Philip Evans:

Mr. LILLICK. Q. (Continuing) You thought it was a little dangerous back there, didn't you, alongside of that hawser?

Mr. HEIDELBERG. That is objected to as immaterial, irrelevant and incompetent, as to what this man thought about it. It is immaterial what he thought about it; it is only material as to what Carlsen and Sauder thought about it.

The COURT. No, not at all. This man is an old sailor. He has a right to give his opinion. Objection overruled.

Mr. LILLICK. Q. (Continuing) You didn't want to go back there alongside that hawser, did you, when there was a place in the alley?

A. No.

Q. Is it not true that wherever there is a hawser like that on a towboat you keep away from the hawser?

A. Yes.

Q. *And it is generally known among the seafaring men that if that hawser snaps somebody is going to get in trouble; that is true, isn't it?*

A. *Yes, sir.*

Q. And the reason you didn't go back there was because you were in a safe place up there in that little alley where you would not get hurt?

A. Yes, it was about as safe a place as any.

Q. It was a great deal safer than back there where the hawser was, wasn't it?

A. Sure.

Q. And that is why you were there, that is true, isn't it?

A. Well, there was not much room about the boat, and I suppose everybody could suit themselves.

Q. And you suited yourself by going in a safe place; that is true, isn't it?

A. Yes, that was a safe place to be" (Evans 349, 350).

We earnestly urge in defense of remarks of the learned court below in his oral opinion in this case, that not only was he justified in saying "It is not, however, denied that it was a dangerous place", but that he was likewise entirely right in adding that such a conclusion was justified by the "experience of all searfaring men". Claimants' proctors' super-technical criticism of the court's oral opinion, is we submit, entirely unjustified.

We submit under the facts here presented that both claimants Carlsen and Sauder knew, or had reasonable apprehension of, the dangerous character of their positions. We are at a loss to comprehend how claimants can seriously urge that they were "non-seafaring men" (Claimants' brief p. 73) in view of their occupation of pile-driving and their consequent familiarity with things maritime. The witnesses who testified for claimants in this case were all members of the pile-driver crew, and all of them exhibited great familiarity with maritime affairs as is shown by their easy use of nautical terms throughout their testimony. It can hardly be said, in view of what the record shows regarding the

maritime knowledge of these pile-driver men, and in view of the common knowledge as to the nature of their occupation, that they are not seafaring men.

There can be no reasonable conclusion but that claimant Carlsen knew his position to be dangerous. He was sitting where at all times he was able to see the tow line, note its movement and taut condition and his own proximity to it (325). He was a seafaring man (316) and had been an able seaman for over four or five years, having sailed mostly on windjammers "all around" and to Canada, England, Australia and the Hawaiian Islands (316). He was foreman of the pile-driver crew (129), and by the nature of his vocation must have been familiar with cordage. He was familiar with towing operations (317).

Claimant Sauder must likewise have known his danger. He was a member of the pile-driver crew. It is a matter of common knowledge that the work of a pile-driver man is largely upon water; that he is frequently towed by boat from place to place; that he is required to be familiar with cordage; and that he frequently goes to and returns from his work by boat. A pile-driver man could not help but realize his danger in such a position as Sauder was in at the time he was injured.

Even had these claimants been mere landsmen, it is obvious that they would have known their danger. Certainly any landsman of ordinary intelligence and with ordinary regard for his own safety, would be

bound to know that such a position as all of these card players assumed on the deck of the "Three Sisters" was in fact dangerous. Certainly no landsman who voluntarily sat with his back to a taut tow-line a few inches from his head, as Sauder did, or who voluntarily sat facing a tow-line two or three feet away, as Carlsen did, can be held not to have known or had reasonable cause to apprehend his danger.

Claimants insist that they did not voluntarily assume this dangerous position, but were virtually forced to occupy the place where they were injured because "it was the only place where they could be" (Claimants' brief p. 73). This contention is preposterous, in view of the evidence, and the District Court's observations aboard ship.

It is not disputed that the entire starboard side, the galley and the forecastle of the "Three Sisters" were available for the men.

Claimants' witness Owen Haney, admitted upon cross-examination that there was enough room for all of the men on the foredeck and starboard side of the vessel. He was on the foredeck opposite the wheelhouse with claimants' witness Philip Evans, at the time of the accident. His testimony on this point is as follows:

> "Q. What is your recollection of the room there was on the foredeck for other men besides you and the man who was with you? Was there room for all of you there?

Mr. HEIDELBERG. That is objected to as assuming something not in evidence, to-wit: that the man was on the foredeck.

Mr. LILLICK. He has already said he was forward of the pilot house.

Mr. HEIDELBEG. No, he didn't. He said he was alongside it.

The COURT. Let him answer the question.

A. Well, I guess if they wanted to string out along there, they might be able to string out along there" (263).

An excuse for the dangerous position of the card players which claimants sought to develop at the taking of the deposition of claimants' witness John True Urquhart, at Los Angeles, over four months before the trial, but one which was not further sustained at the trial, was that the foredeck of the "Three Sisters" was not available for the occupation of the men because the sea was breaking over the bow. Although this contention was exploded at the trial, proctors for claimants are urging it here (Claimants' brief p. 73). Urquhart not only testified that "an occasional dip was taken and the water would run aft alongside the house", but went further and said that at the time of the accident the sea was such that men standing at or in front of the wheelhouse and men standing opposite the engine house would be drenched by the sea (50, 51).

Urquhart's testimony is not only proven untrue by the physical impossibility of the "Three Sisters" taking sea by the bow when on her course of E x S ½ South with the wind and sea at her star-

board quarter (Kruger 97, 98; Mohr 397; Anderson 169), but his testimony is opposed by claimants' own witnesses Owen Haney and George Reid.

"Q. Where were you standing on the way down?

A. You mean coming to Frisco?

Q. Coming from Pt. Reyes to San Francisco, and before the accident.

A. Alongside the pilot house.

Q. On the starboard side?

A. Yes, sir.

Q. You were one of the men who were talking to Anderson?

A. Yes.

Q. Was there any water breaking over you?

A. Once in a while there would be some spray.

Q. *Did you get wet?*

A. *No.*

Q. There was not enough coming over to wet you in any way, was there?

A. Not right at that time, there was not.

Q. I am speaking of the time up to the accident; there was not enough to wet you, was there?

A. I don't think I was wet very much" (Haney 262, 263).

"Q. *Did you notice any water on the deck of the 'Three Sisters'?*

A. *No*" (Reid 376).

It is significant that after the course of the vessel, and the conditions of wind and wave were fixed at the trial, claimants did not produce any evidence to further their lame excuse of a wet foredeck, although their witness, Evans, was with their witness

Haney on the foredeck for a considerable time prior to and at the time of the accident.

Another excuse brought forward by Urquhart was that the men could not occupy the forecastle because of the alleged order of the Captain regarding gasoline fumes and smoking down there (Urquhart 52). This excuse was not further urged at the trial for the very obvious reason that it developed that the "Three Sisters", being a deisel boat, did not use gasoline as a fuel, but used crude petroleum (143, 144).

Captain Kruger testified that the bow was clear (87).

He was contradicted on this point only by the testimony of claimant Carlsen, who testified that the bow was occupied by iron cots (305), and the testimony of claimants' witness Fred Woods, who testified that on the deck forward of the house were stowed a stove and iron cots (422).

Claimants' witness Philip Evans, who remained stationed forward and was one of the men who had an unobstructed view of the bow during practically the entire voyage, testified that the stove was "on the forepart of the pilot house", but did not add one word to show that the bow was not otherwise clear (344).

Claimants' witness Urquhart, testified on this point as follows:

"Q. Then it would be your present recollection that the bow of the 'Three Sisters' was clear upon the return voyage?

A. I am not positive that the casks were there; otherwise the deck would be clear" (53).

When the evidence in this case was concluded there did not remain in the record one plausible excuse for the dangerous position of the injured men, and the only reasonable conclusion from the evidence is that they wilfully assumed their dangerous position, either in disregard of the Captain's warnings (95, 138) or at any rate with their eyes wide open as to the inherent danger of the taut swaying tow-line.

Under the facts in the record claimants are absolutely precluded from any recovery under the rule of decision of this court upon the doctrine of assumption of risk.

In the case of *Smith v. Day,* 100 Fed. 244, a decision of this court, a passenger went aboard a steamer which was known by him to be in close proximity to blasting operations. Like claimants here, he engaged in a game of cards. He was struck by a stone and sued the carrier for negligence. Judge Ross in delivering the opinion of the court, said:

"The plaintiff and his fellow passengers went upon the premises where the blasting was being done with their eyes open. Their right there, whether it was a right by sufference or license, implied or otherwise, was subordinate to the right of the defendants to prosecute the work

> in which they were engaged. These passengers assumed all risks necessarily incident to such work prosecuted with skill and reasonable care —such care as is usually employed under like circumstances. They had a right to expect, and are presumed to have relied upon, this degree of care."

It need only be briefly pointed out that the only expert evidence in the record here shows that the present towage operation was carried out with skill and reasonable care (396-397), and that the degree of care on the part of petitioner required by the decision of this Court in *Smith v. Day, supra,* has more than been complied with.

The comparatively recent case of *The Great Northern,* 251 Fed. 826, was a cause brought by libel to recover for personal injuries sustained by a passenger on board the steamship "Great Northern" from a lurch of the ship which caused him to fall while taking a shower bath. He had the alternative of using the ordinary stationary bathtub on board, but chose to use the shower. This court held that by so doing he assumed the risk, Judge Gilbert saying:

> "While a ship is bound to a high degree of care for the safety of a passenger, the passenger is also required to exercise a reasonable care for his own safety. (Citing authorities.) The appellant was a man 47 years of age. He had been in the plumbing supply business, and had dealt in materials such as that of which the floor of the bathroom was constructed. He must have known, as everyone who takes a bath

> knows, that such enameled ware is smooth, and when wet is slippery. He saw that the floor of the shower bath was wet. He had an opportunity to see and must have seen, what handholds there were. The whole situation was visible to him. There were no latent defects. He knew that a ship at sea was likely to lurch. He knew that stationary bathtubs were available for his use. He chose to use the shower bath, and he assumed whatever risk its obvious condition subjected him to."

It is submitted that as the bar of assumption of risk requires only the concurrence of the following elements:

1. The voluntary assumption by the injured person of a position in fact dangerous when a safe place is available for him.

2. The exercise by the person in control of the operation of "such care as is usually employed in like circumstances", and

3. Knowledge of or reasonable cause to apprehend his danger on the part of the injured person,

and as all of these elements appear in the record in this case, claimants are barred from recovery on the ground of their voluntary assumption of the risks which caused their injuries.

It is further submitted that this preclusion is absolute inasmuch as the doctrine of assumption of risk is independent of the rule of divided damages.

> "The doctrine of assumption of risk is applied in admiralty, however, as freely as in

other branches of jurisprudence, notwithstanding the rule that damages will in some cases of concurrent negligence be divided."
1 *Corpus Juris,* pp. 1327, 1328.

See also: *The Scandinavia,* 156 Fed. 403, at p. 407 and following, where an extended discussion of this question is to be found.

(f) Contributory Negligence.

Claimants Were Injured Through Their Own Gross, Wilful and Inexcusable Negligence, and Are in Consequence Absolutely Barred From Recovery.

Although we cannot conceive of there being any negligence on the part of the petitioner proven or presumed in this case, for the purpose of a full presentation of the law by any possibility here applicable, we are setting forth our view of what the evidence shows of the negligence of claimants and our contention regarding the legal result thereof.

It is certainly established that, even assuming negligence on the part of petitioner (a violent assumption indeed under the evidence), claimants were guilty of such gross, wilful and inexcusable disregard for their own safety as would amount at common law to contributory negligence operating as an absolute bar to all relief.

Claimants urge that even though this be true, they would be entitled to a decree for divided damages under the rule of *The Max Morris,* 137 U. S. 1.

The Max Morris, although decided in 1890, is the last expression of the Supreme Court as to the

effect of contributory negligence in admiralty. At first impression, this case would seem to be authority for the rule that in admiralty, contributory negligence is not an absolute bar to recovery as at common law, but that the matter of the apportionment of damages lies in the discretion of the court.

> "Contributory negligence, in a case *like the present,* should not wholly bar recovery. There would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be *restrained* from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good, will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libellant, *in a case like the present,* where their fault is clear, *provided the libellant's fault, though evident, is neither wilful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief.* We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery.

> The necessary conclusion is, that the question whether the libellant, upon the facts found, is entitled to a decree for divided damages, must be answered in the affirmative, in accordance with the judgment below. This being the only question certified, and the amount in dispute being insufficient to give this court jurisdiction of the whole case, our jurisdiction is limited to reviewing this question. *Chicago Union Bank v. Kansas City Bank,* 136 U. S. 223. Whether, in a case like this, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it."

A careful examination of the opinion will show that the rule of divided damages in case of personal injuries can only be invoked where the libellant's (in this case claimants') fault is neither wilful, nor gross, nor inexcusable, and the circumstances of the case present a strong case for his (or their) relief, and that in the absence of the invocation of the rule of divided damages the preclusion worked by contributory negligence remains absolute.

It is submitted, by the decision of *The Max Morris* the rule of divided damages operates only in a limited number of cases of concurrent negligence in the absence of wilful, gross or inexcusable fault on the part of the injured party.

In view of the fact that claimants, although warned by the Master or at least by the circumstances of a taut swaying tow line right at their

heads, and a tug rolling and pitching in heavy swells, remain playing cards in a place where any man of common knowledge and sense would have realized the impending danger, their conduct under the circumstances must certainly be characterized as wilful and gross and inexcusable and in view of the entire evidence, how can it be said that this is otherwise a strong case for their relief?

The District Court decisions cited by claimants with *The Max Morris* on page 81 of their brief all merely reaffirm without extension the rule of *The Max Morris.* One of these cases, *The Tourist,* 265 Fed. 700, clearly supports our position on the point under discussion. On pages 704 and 705 of the Reporter (265 Fed.) we find the following:

> "In such cases the reasoning of Judge Addison Brown is clearly applicable, and the decisions of admiralty courts have sustained his conclusion that the public good is clearly promoted by holding vessels liable to bear some part of the actual pecuniary loss, *where their fault is clear,* provided that the libellant's fault, though evident, *is neither wilful, nor gross, nor inexcusable.* In the case before me I find that the libellant was at fault, *although his fault does not appear to me to be 'wilful, gross nor inexcusable'.*"

It is respectfully urged that no fair application of the rule of *The Max Morris* would uphold a decree for divided damages in this case.

B. THE ISSUE OF LIMITATION.

It is unnecessary, in view of the record now before this court, to enter into any extended discussion of the evidence on this issue. We consider that our right to limit is so patent under the law that few references to the evidence need be made.

This proceeding was instituted to secure for petitioner the protection of the following substantive enactment of Congress:

> "Sec. 4283 *(Liability of owner not to exceed his interest).* The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, or any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."
>
> Act of March 3, 1851, Ch. 43, 9 Stat. L. 635, Sec. 4283 R. S.

See

6 *Fed. Stat. Ann.* (2d Ed.), p. 336 and fol.;
7 *U. S. Compl. Stat.* (1916), p. 8534 and fol.;
Sec. 8021 *U. S. Compl. Stat.* (1916).

In determining whether petitioner is entitled to the benefit of limitation, the only question for adjudication is whether the cause of loss was done, occasioned or incurred without the privity or knowledge of petitioner.

1. Privity or Knowledge.

The "privity or knowledge" of Sec. 4283 R. S. has been defined as follows:

> "As used in the Statute, the meaning of the words 'privity or knowledge' evidently is a *personal participation* of the owner in some fault or act of negligence causing or contributing to the loss, or some personal knowledge or means of knowledge of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it. There must be some *personal concurrence* or some fault or negligence on the part of the owner himself, or in which he *personally participates,* to constitute such privity, within the meaning of the Act, as will exclude him from the benefit of its provisions."
>
> *Lord v. Goodall, etc. S. S. Co.,* 15; Fed. Cas. No. 8506; affirmed, 102 U. S. 541.

It is also established that where, as in the instant proceeding, a corporation is the petitioner, the privity or knowledge must be that of the "Managing Officers" of petitioner.

> *Craig v. Continental Insurance Co.,* 141 U. S. 638, 35 L. Ed. 886;
>
> *The Princess Sophia* (W. D. Wash. 1921), 278 Fed. 180 at p. 190.

The last proposition is established without dissent in the decisions. The leading case, *Craig v. Continental Ins. Co.,* and one of the last decided cases, *The Princess Sophia,* are therefore cited only as illustrative of the generally recognized rule.

The following portion of the opinion in the case of *"The Princess Sophia"* (W. D. Wash. 1921), 278 Fed. 180, gives an exhaustive discussion of the question under consideration:

> "Recurring to Section 4283, *supra,* it is apparent that the vital issue in limitation of liability is privity or knowledge of the owner.
>
> 'Privity means participating with others in the knowledge of a secret transaction; privately knowing; specially in law having any knowledge of or connection with something.' Std. Dict.
>
> 'To know is to be thoroughly acquainted. In a strict sense, the clear and certain apprehension of a truth.' Std. Dict.
>
> Judge Sawyer in *Lord v. Goodall, etc. S. S. Co.,* Fed Cas. No. 8506, said:
>
> 'The meaning of the words "privity or knowledge" is a personal participation of the owner in some fault or act of negligence, causing or contributing to the loss'.
>
> In *McGill v. Mich. S. S. Co.,* 144 Fed. 788, 75 C. C. A. 518, the Ninth Circuit Court said:
>
> 'The right of a shipowner to limit its liability is dependent upon his want of complicity in the acts causing the disaster.' * * *
>
> Privity or knowledge, as used in the statute, imports an actual knowledge causing or contributing to the loss or knowledge or means of knowledge of a condition of things likely to produce or contribute to the loss without adopting proper means to prevent it. Butler v. Boston S. S. Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; Craig v. Continental Ins. Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; City of Columbus (D. C.), 22 Fed. 460; In re Meyer (D. C.), 74 Fed. 881; The Longfellow, 104 Fed. 360, 45 C. C. A. 379; The

Southside (D. C.), 155 Fed. 364; The Rochester (D. C.), 230 Fed. 519.

Judge Brown in *The Colima* (D. C.), 82 Fed. 665, at page 679, said:

'The knowledge or privity that excludes the operation of statute must therefore be in a measure actual, and not merely constructive; that is, actual through the owner's knowledge, or authorization or immediate control of the wrongful acts or conditions or through some kind of personal participation in them * * *'.

Judge Wolverton, in *The Indrapura* (D. C.), 171 Fed. 929:

'There must be personal participation in the act of delinquency or omission leading to the loss.'

Judge Gilbert in *The Annie Faxon,* 75 Fed. 312, 21 C. C. A. 366:

'It is sufficient if the corporation employ, in good faith, a competent person to make such inspection (boiler). When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight, ceases * * *.'

Mr. Justice White in *LaBourgogne, supra:*

'Mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute'.

It appears to be well settled that where the owner in good faith appoints a competent agent to equip, man, or maintain a vessel or her machinery, any acts of omission or commission of the agents, not participated in personally by the owner, do not constitute privity or knowledge. The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366; The No. 6, 241 Fed. 69, 154 C. C. A. 69;

Boston Marine Ins. Co. v. Metropolitan, etc. L. Co., 197 Fed. 703, 117 C. C. A. 97; Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438; Craig v. Continental Ins. Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; The Marie Palmer (D. C.), 191 Fed. 79; The Murrell (D. C.), 200 Fed. 826. * * *

In *The Erie Lighter,* 108 (D. C.), 250 Fed. 490, it was held:

'It is also entirely well settled that an owner, and in the case of a corporation, the managing officer or officers (in this case the Superintendent of the marine department) may employ others to perform the duties ordinarily imposed by law upon the owner, such as equipment, examination, repairs, etc., and if due diligence is exercised in selecting persons competent for such work, losses or damages done or occasioned through their fault, without actual complicity or knowledge on the part of the owner, are done or occasioned without the "privity or knowledge" of the owner, within the meaning of the Limited Liability Acts. Craig v. Continental Ins. Co., *supra;* The Annie Faxon (D. C. Wash.), 66 Fed. 575, affirmed 75 Fed. 312 (C. C. A. 9th Cir.); The Colima, *supra;* The Jane Gray (D. C. Wash.), 99 Fed. 582; Van Eyken v. Erie R. R. Co.. * * * 117 Fed. 712; McGill v. Michigan S. S. Co., 144 Fed. 788, * * *: Oregon Lumber Co. v. Portland & Asiatic S. S. Co., *supra* (162 Fed. 912); Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., *supra;* Quinlan v. Pew, *supra;* The *Tommy,* 151 Fed. 507'."

In the case of *Pocomoke Guano Co. v. Eastern Transp. Co.,* 285 Fed. 7 (C. C. A. 4, 1922), in holding that a corporate owner might limit its liability for a loss caused by the unseaworthy condition of a

barge where it had exercised good faith and due diligence in the employment of men to put in repair and condition the barge, the court said:

> "Corporations, like others, are entitled to the benefit of limitation of liability from conditions to which they are not privy, and of which they have no knowledge, and they are chargeable with knowledge of the existence of defects, or become privy to acts of negligence causing the same, only when persons representing the corporation in such capacities as to speak for the same are guilty of some negligence or omission to maintain the barge in seaworthy condition. They are likewise exempt from liability for the negligence of third persons employed to repair and put the barge in seaworthy condition, where they have, in good faith, exercised due diligence and care in the selection of such persons; that is to say, those trustworthy, experienced and capable of performing the service, and of good reputation in the business."

Judge Manton of the Second Circuit, in delivering the opinion of the court in *The Oneida,* 282 Fed. 238, holding the owner of a launch entitled to limitation for negligent stranding of a scow, said:

> "Where it appears that a private vessel or a launch is properly manned and equipped at the time of the accident, and the injury occurs without the owner's privity or knowledge, he may be liable for the same only to the extent of the value of the vessel. Under the Act of Congress, he is only chargeable for his willful and negligent acts and the negligence of those in charge of the navigation of the vessel, to which he was not privy and of which he had no knowledge, will not be imputed to him. The Republic, 61 Fed. 109, 9 C. C. A. 386; The

Tommy, 151 Fed. 570, 81 C. C. A. 50; The Alola (D. C.), 228 Fed. 1006.

The knowledge or privity that excludes the operation of the statute must be in a measure actual, and not merely constructive. It must be actual in the sense of knowledge or authorization, or immediate control of the wrongful acts or conditions, or through some kind of personal participation in them. The Colima (D. C.), 82 Fed. 665; Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438; The La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973. There was no evidence in the record indicating that appellee's launchman was incompetent. His long period of service with appellee and his familiarity with the waters in question negatives the idea of incompetency and leads us to conclude that the Oneida was property manned at the time of towing."

"The Tommy", 151 Fed. 570 (C. C. A. 2, 1907), was a case where the loss was occasioned by the breaking of a pair of lifting tongs borrowed by the Master of "The Tommy" from another barge. In holding that the owner might limit his liability, the court there stated:

"* * * It nowhere appears that libelant was negligent in employing either Thompson or Benson or that either of them was unfit to discharge the duties of barge captain. Assuming that the tongs were unfit for this particular service, it appears that libelant had no notice of such unfitness. It would seem to follow, therefore, that the damage was occasioned without the privity or knowledge of the libelant, who provided suitable equipment and appliances and the usual and proper means for replacing the same when they were unfit or worn out."

In *The Republic,* 61 Fed. 109 (C. C. A. 2, 1894), the court, in discussing the construction of the statute limiting liability, suggested that it would be a hard construction to deprive the shipowner of protection where a loss had occurred from the unseaworthy or defective condition of the vessel, without knowledge of the owner and without his personal negligence, and held as follows:

> "It was the intention of Congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own willful or negligent acts. Moore v. Transportation Co., 24 How. (U. S.) 1, 16 L. Ed. 674; Walker v. Transportation Co., 3 Wall. (U. S.) 150, 18 L. Ed. 172; Craig v. Insurance Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438; Hill Manuf'g Co. v. Providence & New York Steamship Co., 113 Mass. 495, 18 Am. Rep. 527."

See also

Van Eyken v. Erie Railroad Co. (D. C.), 117 Fed. 712.

The foregoing authorities clearly establish the rule that where the owner has provided a suitable person or persons to inspect, or provide for the proper equipment of a vessel, he is not deprived of the benefit of the statute by proof of negligence of such persons where he has no notice or knowledge of such negligence or its resultant defect.

(a) Petitioner Was Without Privity or Knowledge.

If any privity to or knowledge of any negligence be considered as proven here, it would attach to but two employees of petitioner, viz.: (a) The Master of the vessel, Captain Kruger, or (b) the Port Engineer of the Company, Oroville Davis.

In order to deprive petitioner of the benefit of limitation of liability it must be established that the privity or knowledge was that of a "managing officer" of the corporation, and, as it is obvious from the uncontradicted evidence in the record that petitioner had no "managing officers" except its directors and executive officers, and, as it has been established without dispute that they were not in any way connected with the cause of the present mishap, it follows that petitioner was without privity or knowledge and is without question entitled to limit its liability.

The distribution of managerial power in the petitioner corporation is established by the testimony of Alexander Paladini, president and general manager of petitioner.

Claimants, however, seek to deprive petitioner of the benefit of the statute by the contention that the privity or knowledge of the Master of the "Three Sisters", Captain Kruger, and/or petitioner's Port Engineer, Davis, was the privity or knowledge of petitioner (Claimants' Brief, p. 83 and fol.).

Regarding the privity or knowledge of the Master of a vessel it was long ago settled that unless he be

one of the owners, his privity or knowledge is not a bar to limitation of liability.

Butler v. S. S. Co., 130 U. S. 527, 32 L. Ed. 1017;

Craig v. Insurance Co., 141 U. S. 638, 35 L. Ed. 886;

The Bordentown, 40 Fed. 682, at pp. 686 and 687;

Quinlan v. Pew, 56 Fed. 111, at p. 117.

To hold otherwise would defeat the very purpose of the act, and no further argument is necessary to show that petitioner cannot be charged with the privity or knowledge of its Master, Captain Kruger.

Claimants contend that the employee of petitioner, Port Engineer Davis, was a "managing officer" of the Company.

The statement on page 84 of claimants' brief that

> "A. Paladini, the president of petitioner corporation, himself testified that 'the actual operation of the vessels, the equipment of the vessels, the running of the vessels, was intrusted to the Port Engineer",

is wholly misleading and does not state either the substance or effect of Alexander Paladini's testimony. We here set forth at length such portions of Alexander Paladini's testimony as treat of Davis' powers and duties as an employee of petitioner:

"Q. How many directors are there of A. Paladini, Inc.?

A. Seven, I think.

Q. Who are they?

A. Myself; Attilio Paladini; Walter Paladini; Hugo Paladini; Henrietta Paladini; Joseph Chicca, who is the secretary.

Q. Which of those directors have any position with the company requiring them to be at the office or offices of the company?

A. I don't get you.

Q. Which of those directors has any position with the company requiring them to be at the office or offices of the company; which of them take an active part in the business?

A. All of them are taking an active part in the business outside of Henrietta Paladini and Hugo Paladini.

Q. What positions do they occupy, I mean the others?

A. My brother Attilio is manager of the Oakland Branch; Walter is with me in the wholesale house; Mr. Chicca is secretary. That is about all. I am the president.

Q. What have they to do with the actual operation of the vessels, the equipment of the vessels, the running of the vessels?

A. Nothing, whatsoever.

Q. How do the vessels obtain their orders, as to what to do and where to go?

A. Through Mr. Davis, the port engineer.

Q. What does that port engineer actually do?

A. The port engineer comes to my market every morning and asks me, or, if I am not there he may ask my brother, if I happen to be out of town, if there are any instructions to be had, and if so we give them to him, and he, in turn, carries them out.

Q. What do you mean by instructions, what kind of instructions?

A. If I have fish at Point Reyes, and I get a telephone from my place up there that there are fish up there, we will tell him to get the boat ready and send it out and pick up the salmon at Point Reyes.

Q. What do you do, or what do any of the directors do, about seeing to it personally whether the boat is properly equipped to do that work?

A. Nobody does that outside of myself. Mr. Davis takes care of my boats, and if any new equipment is necessary I tell him to go and get it, to keep them in running condition.

Q. How many vessels did you own in May and June, 1923?

A. Four large boats in San Francisco.

Q. What were they?

A. The 'Iolanda', the 'Henrietta', the 'Corona' and the 'Three Sisters' " (224, 225).

"Q. Who employed the captains for the boats?

A. I do, with the assistance of my Port Engineer" (226).

"Q. Who hired the crews of the boats?

A. I hired the head fisherman and my head fisherman hires the other fishermen. * *

Q. That has to do with the head fisherman; who took care of the employment of the deck hands, such as Anderson, who was the deck hand on the 'Three Sisters'.

A. The port engineer" (227).

"Q. How, if at all, would you, as president of the company, hear of the need of a new towline?

A. That was the instruction given to my port engineer—anything that was necessary, to get anything at all for the maintaining and upkeeping of those boats, for him to go and get it.

Q. Would he ever report the need of any particular thing to you?

A. Well, if it was something that amounted to lots of money he would, but small things like

that—a tow-line, or ropes, or anything like them —he had orders to go and get them.

Q. How about authority to purchase such a thing as a bridle without referring it to you —would he have such authority?

A. Oh, yes. We give him an order blank, and everything he purchases he puts down on the order blank and turns a duplicate copy in to the office and states what it is for" (231, 232).

"Q. Had Kruger, or Carlton, or Davis, any one of them, ever reported to you or to your office, to your knowledge, that the tow-line or the bridle the 'Three Sisters' was using was inefficient?

A. No, sir.

Q. In the course of the business, who would report to you the need of a new tow-line, if you had needed one?

A. Mr. Davis, the port engineer—whoever was port engineer at the time.

Q. The directors whom you mentioned as not having anything to do with the office work, did they have anything to do with the vessels?

A. No, sir.

Q. Did any of the other officers have anything to do with the vessels?

A. No, sir. If I happened to be out of town and my brother was there, if he had any instructions he would tell the port engineer in the morning what instructions he had, the same as I would, in case I happened to be out of town.

Q. Which brother is that?

A. Walter.

Q. And would those instructions cover anything other than to send a vessel here or send a vessel there, or to go here for fish, or to go there for fish?

A. No. We have two fishing boats. They go fishing every day but Saturday. Those boats are out every day but Saturday. All Mr. Davis has to do with those boats is to see that they are kept up, and to buy whatever equipment is necessary for fishing. Then we have another boat that goes to pick up the fish, up at Point Reyes or at Bodega Bay. If the boats are out they will ring us up that they are in and have some fish. Mr. Davis passes out the word to go to Point Reyes, or to Bodega Bay, or to wherever it may be, and bring the catch in that night.

Q. Does A. Paladini, Inc., buy fish from other fishermen?

A. Yes.

Q. What proportion of the fish that you wholesale do you catch and bring in yourself?

Mr. HEIDELBERG. I cannot see the materiality of that, your Honor.

Mr. LILLICK. The materiality of it is very plain. We are trying to convince the Court, and counsel on the other side, that this operation of the vessels was a very small part of the business of A. Paladini, Inc., wholesale fishermen.

Mr. HEIDELBERG. It happens to be a very important part in this instance.

Mr. LILLICK. Then you should not object to it.

The COURT. I will let him answer it.

A. About 20 or 25 per cent'' (232, 233, 234).

Here follows such parts of the testimony of Port Engineer Davis as deal with his powers and duties as Port Engineer:

"Q. After being employed as such what were your duties?

A. The care and maintenance of the boats and equipment.

Q. With reference to repairs that might be needed upon any of the boats, what did you do?

A. I went ahead and done them or had them done.

Q. Had Mr. Paladini anything to do with them?

A. No, sir.

Q. Did Mr. Paladini have anything to do with the actual management of the vessels in so far as their operation was concerned?

A. Nothing.

Q. Did he inspect the vessels himself?

A. Not that I know of.

Q. What happened if, for example, one of the vessels needed repairs in her engine room, what did you do?

A. Made arrangements to have them done, or done them myself.

Q. Whose discretion was used as to that?

A. Mine.

Q. Did you have anyone over you in any way, Mr. Davis?

A. No one" (178, 179).

"Q. Whose duty was it to see that this towline was good and efficient?

A. My duty.

Q. What employee of A. Paladini inspected vessels belonging to the Company to pass upon their need for new equipment?

A. I did" (183).

"Q. Mr. Davis, from whom do you obtain your instructions as to what shall be done with the vessels?

A. Well, if I don't know myself I go to A. Paladini.

Q. What is the situation with reference to orders for the four vessels which you are now

operating; in other words, where do you obtain your instructions as to what you shall do with those vessels?

A. From the main office.

Q. Have you anything to do individually with where they shall operate?

A. No.

Q. You said a moment ago if you didn't know yourself you got your orders from the main office.

A. Yes.

Q. Where does the information or instruction come from that you referred to as that which you know yourself?

A. I couldn't get that question?

Q. You exercise no independent judgment, do you, about how the vessel shall operate; you are always acting under the orders from the main office, are you not?

A. Yes, sir.

Q. And those orders always come from the main office?

A. Yes.

The COURT. Q. Did Mr. Paladini tell you definitely to send the 'Three Sisters' after the pile driver and the 'Corona' after the workmen, or was that your judgment?

A. Your honor, I didn't quite get that.

Q. You sent the 'Three Sisters' after the pile driver and the barge?

A. Yes.

Q. Did Mr. Paladini tell you to do that?

A. Yes.

Q. You told the 'Corona' to go up and get the men, did you?

A. I did.

Q. Did Mr. Paladini tell you to do that?

A. He did" (184, 185).

"Mr. HEIDELBERG. Q. You take your orders from A. Paladini?

A. Yes.
Q. Where does he give you those orders?
A. Up at the market" (206).

It is submitted from the foregoing that, far from showing that "the actual operation of the vessels, the equipment of the vessels, the running of the vessels was intrusted to its port engineer," the record here shows (1) that the actual operation of the vessels was intrusted to their respective masters (selected by petitioner's president and general manager, Alexander Paladini), and their crews (selected by the port engineer); (2) that the equipment, repair and inspection of the vessels was intrusted to the port engineer (a competent man employed by the company for that purpose), and (3) that the running of the vessels was effected solely by instructions from the main office of petitioner and from the president and general manager in particular when he was in San Francisco.

Port Engineer Davis, it is submitted, under his restricted powers, was neither a "managing officer" nor a "higher officer" of the petitioner corporation. He was at most a mere employee charged with transmitting the directions of the head office of the company to the various masters of the company's vessels, and specifically charged with the duty to keep petitioner's vessels repaired and properly equipped.

The authorities cited by claimants on this point would seem to establish the rule that where the re-

sponsibility to render a vessel seaworthy has either been delegated to, or assumed by, a corporate officer, such as a *general superintendent* or other corporate officer having *general managerial powers,* and such officer is with privity or knowledge, limitation should be denied.

The first case cited by claimants is that of *"The Erie Lighter 108,"* 250 Fed. 494 (D. C. N. J.). That was a cause of limitation upon the petition of Erie Railroad Company, the owner of a lighter, on account of personal injuries to the master of a tug. *It was there held that petitioner was without privity or knowledge* and was consequently entitled to limit its liability. The question was raised as to whether an officer of petitioner to whom had been delegated *the general management and superintendence* of its marine department was a "managing officer" whose privity or knowledge would deprive the company of the right to limit. The court held that the superintendent was a "managing officer," but without privity or knowledge. In view of the general powers possessed by that officer, the holding was unquestionably correct. However, how can such an officer be compared to petitioner's port engineer? Bringing the comparison to the Pacific—could the superintendent of the Marine Department of the Southern Pacific or the O. W. R. & N., who are plainly "managing officers" of their respective companies, be compared to port engineer Davis, a mere employee with no managerial authority whatsoever in his department. The italicized

portions of the opinion from "The Erie Lighter 108" set forth on page 84 of claimant's brief might well be cited for petitioner. Davis is patently not "one to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business."

The case of *Weishaar v. S. S. Co.,* 128 Fed. 400, (C. C. A. 9), cited by claimants, contains the following statement by the court which obviates any further comment on the case:

> "Moreover, the evidence shows that the negligence of the officer in command of the boat was committed in the personal presence and within the actual knowledge of the president of the appellee corporation, who, so far from seeking to enforce the performance of his duty by that officer, acquiesced in his neglect of duty, as affirmatively appears from the president's own testimony."

"The Teddy," 226 Fed. 498, was a limitation proceeding where the alleged craft was a moving platform for the support of a derrick—not a ship at all. The court, after some hesitation, affirmed admiralty jurisdiction but denied limitation because of the privity and knowledge of the superintendent of petitioner. *There is nothing in the opinion to show what the general powers of the superintendent were.* We submit that it is the extent of a corporate agent's general authority which determines whether or not he is a "managing officer" and a case like *"The Teddy",* which finds that an officer called a superintendent was *empowered* to do a specific act,

but does not enlighten us as to the scope of his general managerial powers in his position with his company, is without value as a precedent here.

Claimants have cited *"The Colima,"* 82 Fed. 665 (D. C. N. Y.). In that case limitation was allowed. By way of dicta, readily indentified as such, the court said:

> "If Mr. Schwerin, the superintendent, had been either *charged personally* with the duty of directing or managing the distribution of this cargo, with reference to the stability of the ship, *or had assumed that function,* the company would PERHAPS have been 'privy' to any defects in loading * * *. *However that may be, Mr. Schwerin had no such duty and assumed no such function."*

It does not appear in the opinion what the *actual powers* of the superintendent were, but he must have been a person of consequence in the management of the company's business in view of the portion of the opinion above quoted.

The case of *Oregon Round Lumber Co. v. Portland and Asiatic S. S. Co. et al.* (District Court D. Oregon, 1908), 162 Fed. 912, cited by claimants, is not in point.

That was a case where limitation was denied because the *manager and superintendent* of the petitioner had not employed a competent man to condition the vessel but had *personally* looked after the matter. Both the manager and superintendent were plainly "managing officers" of petitioner, and they

both being with privity and knowledge, limitation was properly denied. The following portion of the opinion shows the inapplicability of the case to the facts here presented:

> "No expert or other person was appointed by the manager or superintendent of the lumber company to make a survey of the barge 'Monarch' to determine with respect to her seaworthiness or fitness to undergo the service to which she was appointed under the demise; but *these officers depended solely upon their own skill and ability for ascertainment as to her condition.*"

In the case of *Re Reichert Towing Line,* 251 Fed. 214 (C. C. A. 2, 1918), limitation was denied for the reason that the owners had not "discharged the burden of proving their want of knowledge or privity," the privity and knowledge in that case being brought home to the owners themselves. The holding has no application here.

Myers Excursion & Nav. Co., 57 Fed. 240, is the District Court's determination of the case of *"The Republic,"* 61 Fed. 109, elsewhere in this brief cited. Under no construction of any part of that opinion can claimants support the contention of their citation.

Judge Gilbert of this court, in the case of *The Annie Faxon,* 75 Fed. 312, in considering the case of *Myers Excursion & Nav. Co.:*

> "The decision is placed on the ground that it was the duty of the corporation, before sending the vessel on the voyage in question, to

> know, by the examination by some proper officer, whether the vessel was fit for the intended voyage. *But the Court did not hold, nor is it implied in the decision, that, if a proper and competent officer had been appointed by the corporation to make such examination, the knowledge acquired by him would be imputed to the company.*"

Regarding the case of *Breaker v. Jarvis Co.,* 166 Fed. 987, claimants' quoted portion of the opinion following:

> "It is well settled that the owner of a vessel is not entitled to limit its liability arising from unseaworthiness of a vessel"

does not state the law.

There is neither reason nor precedent for holding that "the owner of a vessel is not entitled to limit its liability arising from unseaworthiness of a vessel" when, by the plain and comprehensive wording of Sec. 4283 R. S. it is provided that an owner may limit" for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners." Surely it cannot be contended that when such "act, matter or thing, loss, damage or forfeiture" results from unseaworthiness, the owner cannot limit his liability. It is readily observed that most of the cases on the question of privity or knowledge where limitation has been allowed, are cases where the loss arose from a condition amount-

ing to unseaworthiness. We need only mention a few of such cases:

The Annie Faxon, 75 Fed. 312 (C. C. A. 9), —Defective boiler;

Van Eyken v. Erie R. Co., 117 Fed. 712 (D. C. N. Y.)—Defective set screw;

Quinlan v. Pew, 56 Fed. 111 (C. C. A. 1, 1893)—Structural defect—failure of master to inspect and report.

In *Quinlan v. Pew, supra,* the court held that even in the presence of a *warranty of seaworthiness* the owner might limit liability, Circuit Judge Putnam saying:

> "Neither can the proposition of the appellant be maintained, that the statute does not apply, because there was in this case a personal contract on the part of the owners, either express or in the form of an implied warranty, that the vessel was seaworthy. In nearly all the instances which the statute expressly enumerates as those to which the limitation of liability applies, there is necessarily an implied warranty, and frequently an express agreement in the form of a bill of lading; so that, if the contention of the complainant is correct, the wings of the statute would be effectually clipped."

We would again quote from the opinion of the court in the case of *Pocomoke Guano Co. v. Eastern Trans. Co.,* 285 Fed. 7 (C. C. A. 4, 1922), (which was a case involving an unseaworthy barge), the following, which disposes of claimants' contention that there can be no limitation where unseaworthiness exists:

> "They are likewise exempt from liability for the negligence of third persons employed to repair and put the barge in seaworthy condition where they have, in good faith, exercised due diligence and care in the selection of such persons."

In concluding our argument on this point we will quote from the opinion of the court in claimants' much cited case of *Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co.,* 162 Fed. 912:

> "It may be, however, that the unseaworthiness was occasioned or incurred without the privity or knowledge of the owner. It is then that section 4283, Rev. St. (U. S. Comp. St. 1901, p. 2943) comes to the aid of the owner and limits his liability to the value of the craft, so that the liability becomes in effect the liability of the craft only."

In *Parsons v. Empire Shipping Co.* (C. C. A. 9, 1901), 111 Fed. 20, limitation was properly denied as the loss arose with the privity and knowledge of the *general superintendent* of petitioner who was in charge of petitioner's *entire business* in Alaska. The following portions of the opinion are sufficient to dispose of the case as an authority here:

> "To that point was assigned, at the opening of the season of 1899, as the *general superintendent of all of the company's business in that region,* Capt. Bloomburg, who, as has been said, not only superintended the construction of the barges and some of the steamers of the company in New Jersey, but had had, as appears in the record, an extensive experience as

superintendent of various other transportation companies. There is no doubt from the evidence that he was competent for the position assigned him. He left Seattle for St. Michael early in June, 1899, but arrived at his point of destination so ill that he was compelled to return by the same ship, leaving St. Michael, June 12th and leaving *in his place* and in charge of *all the business of the appellee at St. Michael,* F. G. Patterson, who had been sent there by the appellee as the assistant of Capt. Bloomsburg, and was designated freight and passenger agent. *The appellee was advised of Bloomsburg's illness and return and of the fact that Patterson had been put in his place in charge of the company's business at St. Michael, and Patterson was by appellee permitted to remain during the balance of the season.* * * *"

"So that Patterson, an inexperienced man, with full knowledge of appellee's general manager for the Pacific Coast, was allowed to act as *general superintendent of all of its business at St. Michael,* including the control of the entire fleet in those waters."

Oregon Round Lumber Co. v. Portland & Asiatic Co., 162 Fed. 922 (D. C. Ore.), cited on pages 13, 86 and 88 of claimants' brief, and from which quotation is above made, held that the owner was with privity and knowledge where a barge was unseaworthy and *the superintendent and the manager* of the owner had personally made a casual inspection by going through her hold without lights. The court there said:

"They were thus dependent upon their own diligence, and for their lack of diligence in discovering at least what was or would have been

> apparent upon inspection to an unskilled person the corporation would be responsible."

It is submitted that there are no facts in that case which are in any way similar to those in the present record on the point of due inspection of either the "Three Sisters" or her equipment.

(b) Petitioner's Port Engineer and Master Were Competent and Petitioner Used Due Diligence in Selecting Them.

There is, we submit, nothing in the record to show that either Port Engineer Davis or Captain Kruger was incompetent.

Port Engineer Davis was a licensed man of extended experience (including towing) upon the waters of the Mississippi, San Joaquin and Sacramento Rivers and the Pacific Ocean and had been around boats and engines "as far back" as he could remember. He rebuilt the engines of the "Corona" and served as her chief engineer before he became port engineer. (186). We would refer the court on the question of Davis' experience to pages 177, 186, 187, 188 and 189 of the record, where will be found his testimony as to his experience.

Captain Kruger's experience is detailed in his testimony on pages 69 to 73, inclusive, of the record. His testimony shows him not only to have been a licensed master of vessels of the type of the "Three Sisters" plying upon the Pacific Ocean and the particular waters in question for a period since the year 1917 but shows him to have had an extensive

experience in towing barges upon these identical waters.

In employing Davis as port engineer the record shows that Alexander Paladini, the president and general manager of petitioner, knew of Davis' work upon the "Corona," his work for Fairbanks-Morse, and had inquired of Mr. Cooper of the Peterson Launch and Towboat Co. about him before employing him. Mr. Cooper recommended Davis highly (230).

At the time when Alexander Paladini employed Captain Kruger he knew of his work for F. E. Booth (master of over four vessels, (71)) and understood that Kruger "had a wonderful reputation." He inquired of F. E. Booth about Kruger and Booth told him that Kruger was one of his "pet men," was "on the job all the time" and that he "hated to see him go." After this talk with Booth, Alexander Paladini instructed his port engineer to employ Kruger (226, 227).

Under such circumstances how can it be reasonably said that petitioner was negligent in employing either Davis or Kruger?

Davis and Kruger were, it is submitted, in the language of the court in the case of *Pocomoke Guano Co. v. Eastern Trans. Co., supra,* "trustworthy, experienced, and capable of performing the service, and of good reputation in the business." We again quote from the opinion in *The Oneida, supra,* a passage which is particularly fitting here:

"There is no evidence in the record indicating that appellee's launchman was incompetent. His long period of service with appellee and his familarity with the waters in question negatives the idea of incompetency and leads us to conclude that the "Oneida" was properly manned at the time of towing."

2. Section 4493 Revised Statutes Does Not Affect Petitioner's Right to Limitation.

As a closing contention claimants urge that because petitioner did not have its vessel inspected under the hull and boiler inspection provisions of the Act of February 28, 1871 (16 Stat. L. Chap. 100, p. 440 and fol.), "An Act to provide for the better security of life on board of vessels *propelled in whole or in part by steam,* and for other purposes," it cannot limit its liability by reason of the provisions of Section 43 of said act (Sec. 4493 R. S.).

This contention, as it will now be shown, is utterly unfounded.

The Act of 1871 was the culmination of the efforts of Congress to protect the lives of passengers aboard *steam vessels.* The history of the act shows it to have had its origin in the Act of July 7, 1838 (5 Stat. L. Chap. cxci, p. 304 and fol.) of similar title. (See Sec. 71 of the Act of 1871, 16 Stat. L. at p. 459). The particular section of the Act of 1871, upon which claimants rely (Sec. 43, now Sec. 4493 R. S.) first appeared in its present (substantial) wording as Sec. 30 of the Act of August 30, 1852 (10 Stat. L. at pp. 72 and 73).

The provisions of Sec. 30 of the Act of 1852 are identical with those of Sec. 4493 R. S. except that the words "if it happens through any neglect to comply with the provisions of law herein prescribed" in the Act of 1852 have been changed to "if it happens through any neglect or failure to comply with the provisions of this title," in Sec. 4493 R. S., and the provisions immediately following the word "hull" of the Act of 1852, which provisions do not affect the owner, (and with which we are not now concerned) have in Sec. 4493 R. S. been extended so as to give rights *in personam* against the "Master, mate, engineer and pilot" instead of against "an engineer or pilot" as provided in the Act of 1852. It appears then that since 1852 we have had in force substantially the same statutory provision that claimants now argue is applicable.

Section 4493 R. S., it will be seen at a glance, gives to *passengers* upon *steam vessels* two different remedies. The first part of the section gives full recovery as against the "Master and the owner of such vessel, or either of them, and the vessel," "if it happens through any neglect or failure to comply with the provisions of this title, or through known defects or imperfections of the steaming apparatus or of the hull," and the portion of the section succeeding the word "hull" gives rights against the "Master, mate, engineer or pilot" *in personam,* but does not affect the owner or vessel.

It is apparent, then, that the portion of Sec. 4493 following the word "hull" can be ignored here.

An analysis of the first portion of Sec. 4493 shows that its effect is as follows:

(1) Where upon a steam vessel, a passenger or his baggage has sustained damage

(2) He is entitled to full recovery against the vessel or her owner, *if*

(3) Such damage happened:

(a) Through any neglect or failure to comply with the provisions of the title of which the act is a part (Inspection provisions for steam vessels), or

(b) Through known defects or imperfections of the *steaming apparatus* or the hull.

To entitle claimants to the benefit of this statute, they must have been injured aboard a *steam vessel,* they must have been *passengers,* and the *cause* of their injuries must have been either the failure to secure inspection, or known defects or imperfections of the steaming apparatus or the hull. We will now separately consider these requisites, none of which we submit, is present in the case at bar.

1. Claimants were injured aboard a 58-foot Deisel launch. She was not propelled in any way by steam.

2. Claimants, being transported gratuitously after the completion of their work for Healy-Tibbitts Construction Company, were not passengers,

as has been shown in the forepart of this brief (page 4 and fol. *ante*).

3. Claimants were not injured through any failure to secure inspection. The vessel was not subject to inspection. But even it if had been so subject, there is no evidence in the record showing that the cause of the breaking of the borrowed bridle was a defect which would have been discovered by inspection.

4. Claimants were not injured through any known defect or imperfection of the steaming apparatus or the hull.

Claimants state on page 93 of their brief that "The Title referred to in R. S. 4493 is 'Steam Vessels' but by amendment of 1918 'Steamer' was changed to 'any vessel.'" This statement is not supported by the enactment referred to.

The Act of Feb. 14, 1917, Ch. 63, 39 Stat. L. 918 (Fed. Stat. Ann. 1918, Supp. 827) changed the word "Steamer" in R. S. Sec. 4465 to "any vessel." R. S. Sec. 4465 is but one of the many sections of the "Title" referred to by R. S. Sec. 4493. The title and context of the Act of 1917 heretofore referred to lends no support to claimants' misleading statement.

Again, claimants cite Sec. 4427, R. S. as authority for their contention that the "Three Sisters" was subject to inspection as a "tug boat," "towing boat," or "freight boat." She was, we submit,

properly considered, nothing but a private fishing boat which was occasionally used for doing her owner's towing. However, it is apparent from the reading of Sec. 4427 R. S. that only *steam vessels* are within its contemplation. It should be noted that Sec. 4427 R. S. is a substantial re-enactment of Sec. 59 of the Act of Feb. 28, 1871.

The Supreme Court of Massachusetts in the case of *Commonwealth v. Breakwater Co.,* 214 Mass. 10, 100 N. E. 1034, said of the effect of R. S. Sec. 4427:

> "It has been argued that 'No. 43' is a 'freight boat' within U. S. Rev. Stat. Sec. 4427. But the terms of this Section, its general purpose and context and other Sections of its title, as well as 35 U. S. Stat. at large, 428, C. 212, of 1908, indicate that *it applies only to vessels propelled in whole or in part by steam* (U. S. Rev. Stat. Sec. 4399 [U. S. Compl. Stat. 1901, p. 3015] and has no relation to a craft like this."

The first section of the "Title" referred to by Sec. 4493 R. S. is a section which is definitive of the vessels coming within the provisions of the Act of 1871. Sec. 4399 R. S. follows:

> "Sec. 4399 (what vessels are deemed steam vessels). Every vessel propelled in whole or in part by steam shall be deemed a steam vessel within the meaning of this title."

That the provisions of Section 4493 R. S. and Sec. 4427 R. S. apply only to steam vessels is patent from an examination of the Act of 1871, from which they are taken where, in practically every section,

there is exclusive reference to steam vessels. The reason for this conclusion is evident when it is considered that the Act of 1871 was passed before the advent of motor vessels. In 1871 there were but two classes of craft, sail and steam.

In reconciling the limitation statutes with Sec. 4493 R. S. District Judge Choate in the case of *In re: Long Island Transportation Co.,* 5 Fed. 599, at p. 624, said:

> "The damage must not have happened through any neglect or failure to comply with the regulations of the statutes relating to *steam vessels,* nor through known defects of the steaming apparatus or hull."

In *Hines v. Butler,* 278 Fed. 877 (C. C. A. 4, 1921) cited by claimants on page 95 of their brief, the court said:

> "It is difficult to resist the conclusion and the reasoning of the Circuit Court of Appeals of the Ninth Judicial Circuit in the case of The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366. Interpreting the provisions of the Act of 1851 with those of the Act of 1871, or sections 4282, 4283, and 4493, together, the construction would appear to be that as they are statutes upon the same subject, that the earlier one creates a general rule of limitation of liability as then existing and the later statute proceeds to make exceptions for the better security and in favor of passengers. The earlier act applies to all vessels; *the later act applies only as to affording better security of life on board of steam vessels,* where the risk of fire may be greater."

The Annie Faxon, 75 Fed. 312 (C. C. A. 9) was a case where limitation was granted except as to passengers who were injured by the *boiler explosion* which occasioned the loss. That was a case where the cause of loss was reasonably connected with the failure of the owner to comply with the inspection requirements for steam vessels. There is no such *causal connection* here, even had the breaking of the bridle occurred upon a vessel subject to inspection.

III. CONCLUSION.

We respectfully submit that it is established:

I. That claimants were not passengers and that at most the only duty owed them by petitioner was that of using ordinary care and diligence in making the tow.

II. That petitioner was not delinquent in its duty toward claimants, claimants not having sustained the burden of proving the negligence charged by them by either (a) the production of evidence of negligence, or (b) the proof of circumstances from which the inference of negligence would follow in the absence of an explanation (*res ipsa loquitur*).

III. That claimants by their pleading and proof have precluded themselves from reliance upon any presumption of negligence, there being no necessity or legal possibility for "the thing speaking for

itself'' (*res ipsa loquitur*) after claimants have "spoken for it."

IV. That the doctrine of inevitable accident is inapplicable.

V. That even if the doctrine of inevitable accident should be applied it has been satisfied.

VI. That the accident occurred without the privity or knowledge of petitioner.

VII. That Sec. 4493 R. S. is not a bar to petitioner's right of limitation.

In conclusion we earnestly urge that the determination of the District Court arrived at after hearing the evidence and having before it the witnesses themselves to judge of their veracity and after having viewed the vessel, should not be disturbed.

Dated, San Francisco,
March 21, 1925.

Respectfully submitted,

HOMER LINGENFELTER,
IRA S. LILLICK,
Proctors for Appellee.

No. 4452

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM CARLSEN, JOHN SAUDER and AETNA LIFE INSURANCE COMPANY (a corporation), claimants,

Appellants,

vs.

A. PALADINI, INC. (a corporation),

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

HEIDELBERG & MURASKY,
JOSEPH J. McSHANE,
Flood Building, San Francisco,
Proctors for Appellants and Petitioners, Carlsen and Sauder.

REDMAN & ALEXANDER,
333 Pine Street, San Francisco,
BELL & SIMMONS,
Alaska Commercial Building, San Francisco,
Proctors for Appellant and Petitioner, Aetna Life Insurance Company.

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Appellee.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants herein, very respectfully, but very earnestly, petition for a rehearing of the above cause, in which appellants were *denied any recovery at all,* and not *merely limited to the value of the vessel involved.* Their proctors have devoted to this case an extraordinary amount of effort, and are firmly convinced that there has been in it a very serious miscarriage of justice, the consequences of which are chiefly visited upon two plain, industrious

working-men who, through no fault of either of them, sustained permanent injuries as a result of the circumstances appearing in the record and set forth in the brief herein on their behalf.

I.

THE MASTER OF THE "THREE SISTERS" WAS NEGLIGENT IN FAILING TO ORDER INJURED CLAIMANTS AWAY FROM THE HAWSER AND IN NOT ENFORCING SUCH ORDER; INJURED CLAIMANTS WERE NOT CONTRIBUTORILY NEGLIGENT, AND EVEN HAD THEY BEEN SO, THEIR NEGLIGENCE IN THIS ADMIRALTY PROCEEDING WOULD NOT BAR RECOVERY BUT WOULD ONLY DIVIDE THE DAMAGES PROPORTIONATELY TO NEGLIGENCE.

This *first* ground upon which appellants petition for a rehearing although fully briefed by proctors for appellants, *and not attempted to be met by proctors for appellee, was apparently overlooked by the court,* and the vital question presented thereby, which is determinative of appellee's *liability,* has not been decided.

This point is fully, and we believe clearly, presented in the "Brief For Appellants" herein, under sub-heading (g), on pages 72 to 81, particularly pages 75 to 81. It will be noted from the "Table of Contents" of that brief that this subdivision occurs under the superior heading: "First—The Petitioner was Negligent," as one of the respects in which appellee was *negligent,* and is concerned only with appellee's *liability* and not at all with its right

to *limitation* thereof. It is feared that this court's *failure to consider this point* was due to the fact that the order of its presentation was unfortunate and not sufficiently emphatic. This apprehension is strengthened by the fact that *appellee's brief did not mention or make any attempt to meet this contention, because, it is submitted, it cannot be answered.*

The opinion of the District Court says, with respect to the place where injured claimants were seated on the "Three Sisters":

> "Four of them sat down in the stern to play cards. The captain testifies that he warned these men that this was a *dangerous place.* This is denied by the men. It is not, however, denied that it was a *dangerous place,* for the reason that the experience of all seafaring men has shown that the vicinity of where a hawser is fastened, when the other vessel has another vessel to tow, is a *dangerous place"* (Apostles, 472, 473).

The very fact that appellee's petition (Apostles, 8), alleges that its master, "warned the said Carlsen and said Sauder, and the other two men engaged in the game of cards, to stay away from the stern of said vessel and from said tow line," shows that appellee and its master *knew and considered that to be a "dangerous place."* Moreover, the petition further alleges, in this respect:

> "Said Carlsen and said Sauder knew, or by the exercise of ordinary care for their own safety, could and should have known, that *said place upon the motorship 'Three Sisters' where*

> *they were stationed at the time of the breaking of said bridle, was a dangerous place to life and limb for anyone to remain in while said motorship was engaged in towing said barge,* and in going to and remaining at said place said Carlsen and said Sauder failed to exercise ordinary care. Had the said Carlsen and the said Sauder exercised ordinary care for their own safety as men of ordinary prudence would have done under the same circumstances, *by remaining away from said place where they were injured, they could and would have escaped all injury from the breaking of said bridle''* (Apostles, 9).

The petition goes further in making this a direct issue, alleging:

> "The said injuries to the said Carlsen and said Sauder *were in no way caused by fault on the part of said motorship 'Three Sisters', her master,* officers or crew, but were *occasioned solely by reason of the negligence of said Carlsen and said Sauder in that they, the said Carlsen and said Sauder, did not keep away from the stern of said motorship 'Three Sisters' nor from said tow-line* as they were warned by the master of said motorship 'Three Sisters' to do, and as they, as prudent men, should have done'' (Apostles, IV, 9, 10).

All of the foregoing allegations of the petition are specifically denied in the answers of appellants to the petition (Apostles, 37, 38; 17, 18). The issue of negligence on the part of appellee, in the failure of its master to warn claimants away from such dangerous place and in not enforcing such order if given, is therefore properly and directly raised. Moreover, even should it be deemed that the issue

is not framed with all the technical nicety possible, this court is well aware that, in Admiralty, lack of form or preciseness in pleading will not defeat substantive justice. Of this principle there is no better example than its own decision, in a limitation proceeding, wherein it allowed a claimant to prove failure of petitioner to comply with the steamboat inspection law, *even though no reference was made thereto in the pleadings,* saying:

> "It is true that in the pleadings no reference is made to the failure of the railway company to inspect the boiler after it was repaired, and no ground of liability is charged against the company under the provisions of Sec. 4493, by any of the injured passengers, or their representatives. On the contrary, they all seek to recover on the ground of the negligence of the company in continuing the use of a boiler known to be old and defective. *But we do not regard these facts as material.*"

The Annie Faxon, 75 Fed. 312 at 320 (C. C. A. 9). The evidence as to the alleged warning which the master gave to the men, and as to his *admitted* failure to emphasize or enforce it, is fully before the court in the language of the master himself (quoted in Brief For Appellants, 75, 76), so, by no possibility was petitioner misled by the pleadings. The most that he contends that he did, was to say *"to the men standing back aft"* to *"keep clear of the tow-line."* He does not say that he told those men to *"stay away from the stern"* (as the petition alleges, Apostles, 8), or that he said *anything to the*

two injured claimants. He admits that the men to whom he says he spoke did not reply and, when asked if they heard him, said, *"I don't know, I wouldn't testify to that"* (Brief For Appellants, 75). Claimant Carlsen, and also the other men, all positively testify that *they heard no warning from the master* (Brief For Appellants, 75; Apostles: Reid 366, 367; Woods, 420; Rowe, 424; Urquhart, 44; Evans, 341; Hanley, 255; Carlsen, 293, 294, 322, 323). The reason that claimant Sauder did not testify on the subject is that the injury to him *rendered his mind a blank as to the whole voyage* (Sauder, Apostles 439).

There is, therefore, *no conflict or dispute* as to the fact that, whatever the master said, it was not heard. At most, whatever he said was a casual remark.

In any event, *the record shows without conflict, that the master knew that either his warning had not been heard, or that, if it was heard, it was not obeyed, and that he did not repeat it, or take any steps to enforce it* (Brief For Appellants, 75, 76). He *admits* that he *saw* the men in the dangerous place *after he had uttered the alleged warning,* but said or did nothing further, washing his hands of the consequences on his theory that then:

> *"That was their own lookout, not mine.* If I tell a man to stay clear of a towline he ought to have sense enough to stay clear of it."
>
> *Cap. Krueger,* Brief For Appellants, 76.

With these facts in mind, the case is *precisely and peculiarly* within the sound *decision and very language* of this honorable court in the case of

> *Weisshaar v. Kimball S. S. Co.,* 128 Fed. at 400, 401 (C. C. A. 9); Certiorari denied, 194 U. S. 638, 484 Ed. 1162.

That case is quoted at length in the Brief For Appellants, 77-80, to which we respectfully and earnestly refer the court. In the case at bar the master, *knowing that the claimants were in a dangerous place, and not even knowing whether they had heard his alleged warning, did nothing, either by way of repeating his warning to insure that it was heard, or by way of enforcing it, or by way of avoiding the danger and injury by keeping all strain from the tow-line through stopping his engines or otherwise.*

In *Weisshaar v. Kimball S. S. Co.,* the officer warned persons in a small boat that it was overloaded and to get out. They did not obey, and such persons were drowned. So clearly did this court summarize the material facts and law, and so *exactly* do both fit the case at bar, that we cannot refrain from re-quoting, in part, the language heretofore quoted in our brief:

> "Let it be assumed that, when the officer announced that the boat was overloaded and that it was 'risky,' it became the duty of all the passengers to get out—as well those who had entered when there was ample room as those who had caused the overloading—and that

every one who remained thereupon became guilty of contributory negligence; *such fact becomes immaterial, in the face of the further fact that the officer, with full knowledge of the overloading and consequent dangerous condition of the boat, subsequently not only started it on its perilous trip* * * *. It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boats complement of men. *According to his own testimony he made nothing more than a milk and water protest against the entry of anyone.* * * * Even where an injured party is guilty of contributory negligence, such negligence will not defeat the action *when it is shown that the defendant might, by the exercise of reasonable care and prudence have avoided the consequences* of the injured parties' negligence. * * *

"So, here, as has already been said, if the officer in command of the boat had been unable to prevent its overloading (of which, however, there was no evidence), *it was still his right and imperative duty to refuse to start the boat* until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to."

Brief For Appellants, 77-78-79.

The same principle was also applied by the District Court of Maryland to facts which duplicate those in the instant case:

"He therefore *knew that the libelant was in a dangerous position,* and even then it was his duty, either *to see that the libelant moved from that position of danger, or to see that the gypsy was at once thrown out of gear* so as to avoid the great peril in which the libelant was placed.

> * * * It is a familiar rule that where the plaintiff's negligence *is so communicated by knowledge that by the exercise of ordinary care and skill the defendant might have avoided the injury, the plaintiff's negligence cannot be set up in defense of the action.*" *The Steam Dredge No. 1.*
>
> *Brief For Appellants,* 80.

The other cases which are cited in the above pages of our brief fully substantiate the same principle.

For these *conclusive reasons,* aside from all others, appellee is *liable* to appellants, and any negligence on their part is *no* bar. Even had injured appellants been negligent, *and were such negligence a defense,* it would be only a *partial* defense, having the effect of *dividing* the damages in proportion to the negligence, as this court knows, and as is held by the cases cited in:

Brief For Appellants, 81.

In conclusion, upon this ground for rehearing, lest this court be under any misapprehension that appellants endeavored for the first time to raise this question on the appeal, *it was fully presented to the District Court.* Appellants' brief to that court (pages 39-44) contains all of the matter comprised in pages 73-81 of their brief to this court, including the identical quotations from and citation of cases, except that, in the latter brief, the *Devona* and the *Iowan* were added to the *Tourist* and the *Max Morris.*

This point, then, as appears from the opinion of the District Court, *which was oral* (Apostles, 471-474), and the opinion of this court, although, it is submitted, conclusive of negligence on the part of appellee rendering it *liable* to appellants at least to the *extent of the value of the "Three Sisters,"* received *no* consideration from *either* court *and has not been decided.*

II.

THE OPINION OF THIS HONORABLE COURT INDICATES THAT IT WAS UNDER A MISAPPREHENSION CONCERNING WHAT WAS DECIDED BY THE LOWER COURT.

This *second* ground upon which this petition is presented, also vital and determinative of appellee's *liability,* consists of what is respectfully submitted to be a misapprehension by this court of what was decided by the lower court.

It is apprehended that another possible reason for the failure of this honorable court to consider the first ground urged for a rehearing, in addition to the burying of that ground under a sub-heading in a long brief, is a misapprehension concerning what the District Court decided. That court not only held that appellee was entitled to *limit* liability, but that it was *not liable at all.* If, as we urge, appellee's *master was negligent,* then, under the familiar doctrine of *respondeat superior,* appellee is *liable,* even though entitled to *limit* that liability.

The first sentence of this court's opinion, it is respectfully pointed out, is susceptible of the possibility that the court conceived that the District Court merely *limited* appellee's liability *to the value of the "Three Sisters,"* and did not *wholly deny,* as is the fact, *all liability* on the part of appellee. Such sentence reads as follows (italics ours):

> "This appeal is taken from the decree of the court below, *sustaining the appellee's petition for limitation of liability* for the personal injuries sustained by the appellants Carlsen and Sauder while on the motor boat 'Three Sisters' *to the value thereof.*"

Bearing in mind that appellee is a *corporation,* and that the question of its right to *limit* liability is dependent upon its design or negligence *as such corporation,* as distinguished from the negligence of its servants, the last sentence of this court's opinion emphasizes, rather than relieves, the apprehension which has been expressed. The context immediately preceding such last sentence lends added support to our solicitude in this respect. This sentence reads:

> "We are not convinced that the court below was in error in holding that the accident was not caused by the design or the negligence *of the appellee* and did not occur with its privity or knowledge."

Obviously, this is not a matter for argument, depending, as it does, solely upon this court's knowledge and intent.

III.

THIS HONORABLE COURT, IN RENDERING ITS OPINION WAS UNDER A MISAPPREHENSION OF FACT WITH RESPECT TO THE DEFICIENCY OF THE TOWING BRIDLE USED BY THE "THREE SISTERS" AND THE LACK OF INSPECTION THEREOF BY ANY OF APPELLEE'S SERVANTS, WHICH LED TO A MISAPPLICATION OF LAW, AND A DIRECT CONFLICT WITH THIS COURT'S OPINION IN A CASE SUBSEQUENTLY DECIDED BY IT ON MAY 11, 1925.

This *third* ground upon which this petition is presented, also vital and determinative of appellee's *liability,* and *also* of its right to *limit that liability,* was considered by this court, but, it is respectfully submitted, under a misapprehension of fact which led to a misapplication of law.

It stands *admitted* on the record that *neither the master nor the single deckhand* of the "Three Sisters" *ever* made *any inspection* of the steel towing bridle or swivel. It is likewise *admitted that no one* made any inspection thereof at Point Reyes *before the voyage in question began.* On the *short* voyage from Point Reyes to San Francisco the *steel* towing bridle *broke,* not only in *one* place, *but in two widely separated and distinct places.* The appellee did not disclose the *age* of the bridle, but the record shows that it had been borrowed, and had been *subjected to usage* for an *undisclosed length of time* theretofore. The appellee offered *no history* of such usage. *No* bad weather was encountered, but only the ground swells *always present and to be expected* at that place at that time of year, as was admitted

by appellee's proctors (*and it is here submitted that this court was under a serious misapprehension of fact in quoting the testimony of the captain, in the second paragraph of its opinion on page four thereof, in view of his following testimony, and proctors' admission*):

> "The weather was fair; the wind was light northwesterly; the sea was smooth except for westerly *ground swells of the kind usually encountered in those waters at that time of the year*" (Mr. Lingenfelter, Brief For Appellants, 22),

and by appellee's master:

> "There was *just an ordinary* heavy ground swell" (Cap. Krueger, Brief For Appellants, 18).

Nevertheless, while a *manila* line which bore the *entire* strain of the tow *held* and did *not* break, the *steel* bridle broke in *two places,* as aforesaid. The testimony of two *disinterested* witnesses, who *actually handled* the fastening of the bridle on *two* occasions, one of which was at the inception *of this very voyage at Point Reyes,* is that it was *not* in proper condition (Brief For Appellants, 45-48). The appellee *failed to produce* the broken bridle, and did not make any examination of it, even *after* it broke (Brief For Appellants, 63, 68). The court is in error, on page 3 of its opinion, in saying that the "prior port engineer of the appellee" testified that he *inspected* the bridle. He did not *touch* it, but merely *looked* at it while *it* was on the *barge*

and *he* was on the *wharf* (Brief For Appellants, 53).

The only person who even *claims* that he inspected the bridle was Davis, appellee's subsequent port engineer. We ask the court to reread what was said in our brief concerning his testimony, pages 54 to 66, and, if it is not presumptuous on our part, the whole of that man's testimony, in the light of our said comment thereon. As stated in our brief, pages 11, 12, *we do not ask this court to resolve any conflict of evidence in appellants' favor. We do ask that, when a man says black is white, or says that he did something which his own testimony clearly shows he did not do, and which the event itself proves he did not do, this court refuse to accept his statement.* We ask this honorable court, in this respect, as to the testimony of Davis, to remove itself from the sphere of the following criticism of an Admiralty authority of distinction and authority, and to follow its *own* combined intelligence and ability:

> "The appellate courts have gone very far in practically refusing to review questions of fact where the District Judge has had the witnesses before him, though not so far where part or all of the evidence has been by opposition. *This doctrine is largely an abdication of the trust confided in them,* and, for an admiralty court, smacks too much of the old common law fiction as to the sacredness of a jury's verdict. * * *
>
> But in districts of *crowded dockets, where numerous cases, each with numerous witnesses, are tried in rapid succession,* and then taken

under advisement for months, nothing short of a moving picture screen, with a photographic-phonographic attachment, could bring it back to the judicial mind. *To give this amiable fiction the scope which it has often been given is in effect to deny an appeal on questions of fact, which the statutes are supposed to give.* That seeing witnesses is an advantage cannot be denied. *But its importance has been grossly exaggerated. Surely the combined intelligence of the three appellate judges as against the one trial judge ought to overbalance it."*

Hughes on Admiralty, 2nd Ed., pp. 409-410.

Bearing in mind the above brief summary of fact, it is respectfully submitted that the decision in the instant case is in *direct conflict* with its more recent and sound decision in the as yet unreported case of *United States King Coal Co.,* May 11, 1925, C. C. A. 9.

As that case is still fresh in the mind of the court, we shall quote from it only briefly. After quoting from the case of *The Olympia,* 61 Fed, 120, which involved the breaking of a *tiller rope,* and following the sound principles therein laid down by Judge Lurton with respect to inevitable accident, this court said:

"Had the Commanding Officer, *under the circumstances disclosed in the testimony, the right* to put the electric steering apparatus, controlling the rudder up against a strong running flood tide, throwing suddenly on the apparatus a load too great for the fuse to carry?

The burden is clearly upon the officers of the submarine to justify such dangerous naviga-

tion. *The strain on the electrical apparatus should have been anticipated* when too great a load was placed upon it. *In the situation we have here presented the doctrine applicable is res ipsa loquitur—the situation speaks for itself* —and fixes the charge of negligence upon the submarine."

Typewritten Opinion, p. 15.

We are confident that the application of this principle to the case at bar must result in the granting of a rehearing. The same principle has been frequently applied to the breaking of towing *hawsers and bridles*—the tug is bound to *anticipate any weather ordinarily to be expected* in the course of the voyage which she undertakes, and to provide hawsers and bridles *of sufficient strength to hold therein:*

The Supreme Court said, in the *Quickstep,* supra:

"If it was good seamanship on the part of the *captain of the tug* to back in such an emergency, *he was required, before undertaking it, at least to know that his bridle line would hold.*"

Judge Benedict said in the *Francis King,* supra:

"This breaking of her hawser casts upon the tug the responsibility of the loss which resulted therefrom. * * * The towboats engaged in that business must be competent in power and equipped *with hawsers of sufficient strength to hold their tows in any weather ordinarily to be anticipated in that navigation."*

In the *Sweepstakes,* the court said:

> "Undoubtedly it was the duty of the tug to see that the line was securely fastened, no matter what mode of fastening was adopted, and *so as to hold in all emergencies likely to happen, whether ordinary or extraordinary; and the fact that it did not so hold is the best evidence that the duty was not performed.*"

It was sufficiently pointed out in our brief that the doctrine of *res ipsa loquitur* applies equally to *tort* cases and *contract* cases. Hence, the fact that this court holds injured appellants not to have been "passengers" in a technical sense, is not material. It is respectfully submitted that the application of the law *to the facts* upon this point would result in a determination that appellee is *liable and not entitled to limit* that liability, since the appellee was privy to the negligence of its port engineer Davis (Brief For Appellants, 81-91).

It would be futile to reargue fully a point which we believe was fully presented in the Brief For Appellants. We therefore respectfully refer the court to the portions of our brief which state the facts and the law with respect to this question.

We ask that the court first reread pages 11 and 12 of our brief; then reread sub-heading (a′) page 15 to (a″), page 25; then to reread sub-heading (b), page 44 to (2), page 70; then the quotations from the following cases on the following pages of that brief, as well as its own above decision of

May 11, 1925, in *U. S. v. King Coal Co.,* not yet in print:

Steam Tug Quickstep, p. 30; *The Francis King,* pp. 30-32; *The Nettie,* p. 32 (and cases cited thereunder); *The Sweepstakes,* pp. 34, 35; *Leech v. S. S. Miner,* p. 28; *The Wasco,* pp. 29, 30; *The W. G. Mason,* p. 39; *The Enterprise,* pp. 36-38.

IV.

THIS HONORABLE COURT ERRED IN CONSTRUING R. S. 4493 AS APPLICABLE ONLY TO COMMON CARRIERS OF PASSENGERS, OR TO CARRIERS OF "PASSENGERS" IN ANY TECHNICAL LEGAL SENSE OF THAT WORD.

This *fourth* ground upon which this petition is presented, also vital and determinative of appellee's right to limit liability, consists of what is respectfully submitted to be an error of law in construing Federal Statutes.

As this court itself has said of R. S. 4493, holding *inspection* to be a *condition* to the right to limit liability:

> "Section 4493, as appears by its title as well as by its provisions, *was intended to provide for better security of life on board steam vessels.*"
>
> *The Annie Faxon,* 75 Fed. at 318 (C. C. A. 9.)

As pointed out in Brief For Appellants, p, 93, the inspection laws, after the decision in the *Annie*

Faxon, were extended to *all* vessels, instead of being confined to *steam* vessels, and by Sec. 4427, expressly to tug-boats, towing boats and freight boats.

It is submitted that the *very purpose* of R. S. 4493, and such related sections, is to prevent or deter vessel owners from undertaking to carry *innocent persons on vessels which have not been inspected, and to so expose them to danger.* The purpose was not to distinguish between one who was being carried *free of charge* and one who was *paying fare,* but, in the above language of this court, "to provide for better *security of life* on board steam (now any) vessels." The word "passenger" was used in such statute, not in any narrow and technical legal sense, but in the same sense as it is used and defined in the English Shipping Act of 1894:

> "The expression 'passenger' shall include *any person carried in a ship other than the master and crew, and the owner, his family and servants.*"
>
> *Brief for Appellants,* p. 9.

Deeply appreciating that this honorable court is fully as solicitous to dispense justice as are our clients to receive it, we ask a rehearing on behalf of appellants, convinced that, inadvertently, *substantial error has been committed,* which, when corrected, will result in a decree fixing *liability* upon appellee for the serious, permanent injuries to two

deserving men, and in the denial of any *limitation* thereof, or *at least,* in the former relief.

Dated, San Francisco,
May 18, 1925.

Respectfully submitted,
HEIDELBERG & MURASKY,
JOSEPH J. MCSHANE,
Proctors for Appellants and Petitioners, Carlsen and Sauder.
REDMAN & ALEXANDER,
BELL & SIMMONS,
Proctors for Appellant and Petitioner, Aetna Life Insurance Company.

CERTIFICATE OF COUNSEL.

We, Jewel Alexander, Golden W. Bell, Henry Heidelberg, and Joseph J. McShane, hereby certify that we are of counsel for the appellants in the above entitled cause, and that in our opinion the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco,
May 18, 1925.

JEWEL ALEXANDER,
GOLDEN W. BELL,
HENRY HEIDELBERG,
JOSEPH J. MCSHANE,
Of Counsel for Appellants and Petitioners.

No. 4454

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS AND SONS, JACOB H. JONAS, MAX I. JONAS, DAVID A. JONAS, and HARRY J. MALERSTEIN,

Appellants,

vs.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Appellants:

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727–30 California Building, Los Angeles, California.

For Appellees:

Messrs. FRANK L. A. GRAHAM and FORD W. HARRIS, Esqs.,
Higgins Building, Los Angeles, California.

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

CITATION.

United States of America,
Ninth Judicial Circuit,—ss.

To August Roberti, Jr., and Edward L. Roberti, GREETING:

You and each of you are hereby cited and ad-

monished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said Circuit, on the 12th day of July, 1924, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the Southern District of California, Southern Division, Ninth Judicial Circuit, in that certain suit in Equity No. G–79, wherein you and each of you are plaintiffs and appellees, and J. H. Jonas, Jacob J. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein are defendants and appellants, to show cause, if any there be, why the order or decree entered in this cause in the District Court on the 3d day of June, 1924, against appellants, and mentioned in said appeal, should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM P. JAMES, United States District Judge of the Southern District of California, Ninth Judicial Circuit, this 9th day of July, 1924.

WM. P. JAMES,
U. S. District Judge, S. D. C. S. D.

[Endorsed]: In Equity—No. G–79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr. et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Filed Jul. 10, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk.

Received copy of the within citation this 10th day of July, 1924.

F. L. GRAHAM,
FORD W. HARRIS,
Attorneys for Appellee.

In the United States District Court, Southern District of California, Southern Division.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS & SONS, JACOB H. JONAS, MAX I. JONAS, DAVID A. JONAS, and HARRY J. MALERSTEIN,

Defendants.

BILL OF COMPLAINT FOR INFRINGEMENT OF LETTERS PATENT No. 1,180,432.

Now come the plaintiffs in the above-entitled suit and complaining of the defendants above-named allege:

I.

That August Roberti, Jr., and Edward L. Roberti are residents of the county of Los Angeles, State of California, and citizens of said state.

II.

That defendants Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein are resi-

dents of the county of Los Angeles, State of California and citizens of said State; that J. H. Jonas is doing business under the fictitious names of J. H. Jonas & Sons in the County of Los Angeles, State of California.

III.

That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

IV.

That theretofore, to wit, on and prior to February 18th, 1915, August Roberti, Jr., and Edward L. Roberti were the original, first and joint inventors of a certain new and useful invention, to wit, [1*] a Non-stretching, Ventilated Mattress, which had not been known or used by others in this country before their invention thereof, nor patented nor described in any printed publication in this or any foreign country before their said invention thereof, or more than two years prior to their application for a patent, nor was the same in public use or on sale in this country for more than two years prior to their application for a patent in this country and being such inventors, heretofore, to wit, on February 18th, 1915, said August Roberti, Jr., and Edward L. Roberti filed an application in the Patent Office of the United States praying for the issuance to them of letters patent for said new and useful invention.

V.

That thereafter, to wit, on April 25th, 1916, let-

*Page-number appearing at foot of page of original certified Transcript of Record.

ters patent of the United States for the said invention dated on said last-named day and numbered 1,180,432, were issued and delivered by the Government of the United States to the said August Roberti, Jr., and Edward L. Roberti, whereby there was granted to August Roberti Jr., and Edward L. Roberti, their heirs, legal representatives and assigns, for the full term of seventeen years from April 25th, 1916, the sole and exclusive right to make, use and vend said invention throughout the United States of America and the territories thereof, and a more particular description of the invention patented in and by said letters patent will more fully appear from the letters patent ready in court to be produced by the plaintiffs.

VI.

That plaintiffs ever since the issuance of said letters patent have been and now are the sole holders and owners of said letters patent and all rights and privileges by them granted, and have under the firm name of Roberti Bros., constructed, made, used and sold mattresses containing and embracing and capable of carrying out the invention patented by the said letters patent [2] and upon each of said mattresses have stamped and printed the day and date of and the number of said letters patent and the same have gone into general use.

VII.

That the plaintiffs herein entered into the business of making mattresses in the year 1902 in the City of Los Angeles, State of California, and have built up a high reputation with the public due to

the excellence of the product manufactured and sold by them, which reputation has since been maintained; that plaintiffs introduced to the public the mattress embodying the invention set forth in letters patent numbered 1,180,432 aforesaid and have adopted and used since June 1st, 1915, upon all such mattresses made and sold by them the name "SANOTUF" and upon a certain grade of such mattresses have adopted and used since the year 1903 the word "RESTMORE"; that plaintiffs have expended large sums of money in advertising said mattresses under such names; that such names and designations have become in the minds of the trade and public generally, associated with and designative of the mattresses made and sold by plaintiffs.

VIII.

That defendants, well knowing the rights of plaintiffs herein, as your plaintiffs are informed and believe, did on or about the 1st of January, 1923, adopt and use upon mattresses made and sold by them, and containing the inventions covered by said letters patent numbered 1,180,432, the words "TIED-NOTUFT" and "RESTAMORE" with the intent and purpose of deceiving the public and trade into the belief that the mattresses made and sold by defendants, and so marked, were in fact mattresses made and sold by plaintiffs.

IX.

That by reason of the fact that defendants have so marked their mattresses as set forth in paragraph VIII there is constant confusion in the minds of the public, due to the adoption and [3] use by the

defendants of the names aforesaid, and the business and goods of the defendants have been confused with the business and goods of plaintiffs.

X.

That all of the aforesaid acts of defendants set forth in Paragraphs VIII and IX herein have been done with full knowledge of the rights of plaintiffs in and to the names "SANOTUF" and "RESTMORE" and all such acts have been done without any commercial necessity therefor and with the fraudulent, unfair and unlawful intent and purpose of creating in the minds of the public the idea that the mattresses made and sold by defendants are in fact the goods of plaintiffs.

XI.

That plaintiffs are informed and believe and therefore allege that the defendants threaten and intend to continue their unlawful acts and thus cause plaintiffs irreparable damage for which plaintiffs have no plain, speedy or adequate remedy at law.

XII.

That, by reason of the premises and the fraudulent, unfair and unlawful acts of the defendants as aforesaid, plaintiffs have been and are prejudiced and injured in their business and will be seriously and irreparably injured unless each of the defendants are restrained and enjoined from the aforesaid unlawful acts. That the reputation of plaintiffs' business has been and is in danger and its sale of mattresses by reason of defendants' act has been and will be seriously reduced. That plaintiffs have

already sustained great loss and damage, the amount thereof cannot be stated with accuracy by reason, among other things, of ignorance as to the number of mattresses which have been sold by defendants under the names "TIEDNOTUFT" and "REST-AMORE" aforesaid.

XIII.

That at divers times within six years last past in the Southern District of California, the defendants herein, J. H. [4] Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein, without the license or consent of the plaintiffs have used the mattresses described, claimed and patented and have made and sold the mattresses described, claimed and patented in and by the said letters patent No. 1,180,432, and have infringed upon said letters patent and each and all claims thereof, and intend and threaten to continue so to do.

XIV.

That by reason of the infringement aforesaid, plaintiffs have suffered damages and plaintiffs are informed and believe that the defendants have realized profits but the exact amount of such profits and damages is not known to plaintiffs.

XV.

That plaintiffs have requested the defendants to desist and refrain from further infringement of said letters patent and to account to the plaintiffs for the aforesaid profits and damages but the defendants have failed and refused to comply with

such request or any part thereof, and are now continuing and carrying on the said infringement upon said letters patent daily and threaten to continue the same and unless restrained by this Court will continue the same, whereby plaintiffs will suffer great and irreparable injury and damage for which plaintiffs have no plain, speedy, or adequate remedy at law.

WHEREBY, plaintiffs pray as follows:

I.

That a final decree be entered in favor of the plaintiffs, August Roberti, Jr., and Edward L. Roberti, and against the defendants J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, perpetually enjoining and restraining the said defendants, their agents, servants, attorneys, workmen and employees, and each of them, from using the mattresses described, claimed and patented in and by said letters patent No. 1,180,432, [5] and from making using or selling the mattresses described, claimed or patented in and by the said letters patent and from infringing upon said letters patent or any of the claims thereof, either directly or indirectly or from contributing to any such infringement.

II.

That upon the filing of this bill of complaint or later on motion, a preliminary injunction be granted to the plaintiffs enjoining and restraining the defendants, J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas,

Max I. Jonas, David A. Jonas and Harry J. Malerstein, their agents, servants, attorneys, workmen and employees, and each of them, until the further order of this Court, from using the mattresses described, claimed and patented in and by said letters patent No. 1,189,432, and from making, using or selling the mattresses described, claimed and patented by said letters patent and from infringing upon said letters patent or any of the claims thereof either directly or indirectly, or from contributing to any such infringement.

III.

That plaintiffs have and recover from the defendants the profits realized by the defendants herein and the damages suffered by the plaintiffs and by reason of the infiringement aforesaid, together with the costs of suit and such other and further relief as to the Court may seem proper and in accordance with equity and good conscience.

IV.

That, in addition to the profits to be accounted for as aforesaid, plaintiffs have and recover from the defendants, and each of them, the damages suffered by the plaintiffs and by reason of the unfair competition aforesaid.

V.

That the defendants, J. H. Jonas, doing business under the [6] firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, *David A.* and Harry J. Malerstein, their agents, servants, attorneys, workmen, and employees, and each of them, be perpetually enjoined and restrained from using the

names "TIEDNOTUFT" and "RESTAMORE" upon mattresses made or sold by them or in any way or manner marking mattresses as to deceive the public into believing the mattresses made and sold by defendants are the mattresses made and sold by plaintiffs.

Answer under oath is hereby expressly waived.

AUGUST ROBERTI, Jr.,
EDWARD L. ROBERTI,
Plaintiffs.

FRANK L. A. GRAHAM,
FORD W. HARRIS,
Solicitors and Counsel for Plaintiffs. [7]

State of California,
County of Los Angeles,—ss.

August Roberti, Jr., and Edward L. Roberti, being duly sworn, each for himself, deposes and says that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters, he believes it to be true.

AUGUST ROBERTI, Jr.
EDWARD L. ROBERTI.

Subscribed and sworn to before me, this 5th day of March, 1923.

[Seal] VIRGINIA A. ARCHER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. No. G–79—Eq. United States District Court, Southern District of Cali-

fornia, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiff, vs. J. H. Jonas, etc., Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, Defendants. In Equity. Bill of Complaint for Infringement of Letters Patent No. 1,180,432. Filed Mar. 7, 1923. Chas N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building, Los Angeles, Cal., Attorneys for Plaintiffs. [8]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

ANSWER.

Come now the defendants above named, and each for himself and not one for the other, make answer to plaintiffs' bill of complaint herein, and deny and allege as follows:

I.

Each defendant has no knowledge, except by said complaint as to the residence of August Roberti, Jr., and Edward L. Roberti or that they are citizens of the State of California.

II.

Each defendant Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein admit that they are residents of the county of Los Angeles, State of California, and citizens of said State; J. H. Jonas admits that he is doing business under the fictitious name of J. H. Jonas & Sons in the county of Los Angeles, State of California.

III.

Deny that the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

IV.

Deny that on or prior to February 18, 1915, or at any other time, August Roberti, Jr., or Edward L. Roberti were the original, first or joint inventors of any new or useful invention or any invention at all, for Non-stretching, Ventilated Mattress which [9] had not been known and (or) used by others in this country before their invention thereof and deny that the same was not patented and described in any printed publication in this or any foreign country prior to the alleged invention thereof, and more than two years prior to their application for any alleged patent thereon, deny that same was not in public use and on sale in this country for more than two years prior to any alleged application for a patent in this county, deny that heretofore, to wit, on February 18, 1915, or at any other time, said August Roberti, Jr., or Edward L. Roberti filed any application in the Patent Office of the United States for the issuance to them of any let-

ters patent for any alleged new or useful invention, and each defendant requires strict proof therof.

V.

Deny that on April 25, 1916, or at any time or at all, any alleged letters patent of the United States for the said invention dated on said last-named day or any day, or numbered 1,180,432 were issued or delivered by the Government of the United States to said August Roberti, Jr., or Edward L. Roberti, whereby there was granted to August Roberti, Jr., or Edward L. Roberti, their heirs, legal representatives or assigns, or any person at all, for the full term of seventeen years from April 25, 1916, or for any term, the sole or exclusive right, or any right, to make, use or vend said alleged invention throughout the United States of America and the Territories thereof, or that a more particular description or any description at all of any alleged invention patented in or by said alleged letters patent will more fully appear from the alleged letters patent alleged to be ready in court to be produced by the plaintiffs; and allege that said letters patent are void and of no effect.

VI.

Deny that the plaintiffs ever since the issuance of said purported letters patent have been or now are the sole or any holders or owners of any purported letters patent or all [10] rights or privileges by them alleged to be granted, or have under the firm name of Roberti Bros. or any other name constructed, or made, or used, or sold any alleged mattresses containing or embracing or capable of

carrying out the alleged invention alleged to be patented by the alleged letters patent or upon each of said alleged mattresses have stamped or printed the day or date of or the number of said alleged letters patent, or the same have gone into general use; and each defendant requires strict proof of the matters herein contained.

VII.

Deny that plaintiffs herein entered into the business of making mattresses in the year 1902 in the city of Los Angeles, State of California, or have built up a high reputation with the public due to the excellence of the product alleged to be manufactured or sold by them, which alleged reputation has since been maintained; deny that plaintiffs introduced to the public the alleged mattress embodying the alleged invention set forth in letters patent No. 1,180,432, or have adopted or used since June 1st, 1915, or at any other time, upon all such purported mattresses made or sold by them the name "SANOTUF" or upon a certain grade of such alleged mattresses have adopted or used since the year 1903 the word "RESTMORE"; deny that plaintiffs have expended large sums or any sums at all of money in advertising said alleged mattresses under such alleged names; deny that such alleged names or alleged designations have become, in the minds of the trade or public generally, associated with or designative of the alleged mattresses made or sold by plaintiffs; and on the contrary allege that the plaintiffs have no right to the exclusive use of the word "RESTMORE," as the

same has been in general use throughout this country long prior to the alleged use by the plaintiffs, by the following firms and others whom these defendants pray leave of this Court to insert by amended answer when ascertained: [11]

Alabama Broom & Mattress Company, Huntsville, Alabama;

Restmore Manufacturing Co., Vancouver, B. C.;

Wichita Mattress Co., Wichita, Kansas.

VIII.

Deny that defendants, well knowing the purported rights of plaintiffs herein, as your plaintiffs are informed and believe, did on or about the 1st of January, 1923, or at any other time, adopt or use upon mattresses made or sold by them, or containing the inventions covered by said alleged letters patent numbered 1,180,432, the words "TIEDNOTUFT" or "RESTAMORE" with the intent or purpose of deceiving the public trade into the belief that the mattresses made or sold by defendants, or so marked, were in fact mattresses made or sold by plaintiffs.

IX.

Deny that by reason of the fact that defendants have so marked their alleged mattresses as set forth in paragraph VIII there is constant confusion in the minds of the public, due to the adoption or use by the defendant of the alleged names aforesaid, or the business or goods of the defendants have been confused with the alleged business or alleged goods of plaintiffs.

X.

Deny that all of the alleged aforesaid acts of defendants alleged to be set forth in paragraphs VIII or IX herein have been done with full or any knowledge of the alleged rights of plaintiffs in or to the names "SANOTUF" or "RESTMORE" or all such alleged acts have been done without any commercial necessity therefor or with fraudulent, unfair or unlawful intent or purpose of creating in the minds of the public the idea that the alleged mattresses alleged to be made or alleged to be sold by defendants are in fact the alleged goods of plaintiffs.

XI.

Deny that the defendants threaten or intend to continue their alleged unlawful acts or that any unlawful acts have in fact been [12] committed or thus cause plaintiffs irreparable damage or any damage at all, for which plaintiffs have no plain, speedy and adequate remedy at law, and on the contrary the defendants allege that if the plaintiffs have any alleged cause of action as against each defendant that there is an adequate remedy at law.

XII.

Deny that by reason of the premises or the fraudulent, unfair or unlawful acts or any acts, of the defendants as aforesaid, plaintiffs have been or are prejudiced in their alleged business or will be seriously or irreparably injured unless each of the defendants are restrained or enjoined from the aforesaid unlawful acts; deny that the reputation of plaintiffs' alleged business has been or is

in danger or its sale of alleged mattresses by reason of defendants' acts has been or will be seriously reduced. Deny that the plaintiffs have already sustained great loss or damage or any loss or damage or at all, the amount thereof cannot be stated with accuracy by reason, among other things, of ignorance as to the number of alleged mattresses which have been alleged to be sold by defendants under the names "TIEDNOTUFT" or "RESTAMORE" aforesaid.

XIII.

Deny that at diverse times within six years last past, or at any other time, in the Southern District of California, or at any other place, the defendants herein, J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, or Jacob H. Jonas, or Max I. Jonas, or David A. Jonas or Harry J. Malerstein without the license and consent of the plaintiffs have used the alleged mattresses alleged to be described, or claimed or patented or have made or sold the alleged mattresses alleged to be described or claimed or patented in or by the said alleged letters patent No. 1,180,432 or have infringed upon said letters patent or each or all the alleged claims thereof or intend or threaten to continue so to do. [13]

XIV.

Deny that by reason of the alleged infringement aforesaid, plaintiffs have suffered damages, or plaintiffs are informed or believe that the defendants have realized profits or that the exact amount,

if any, of such alleged profits or damages, is not known to plaintiffs.

XV.

Deny that plaintiffs have requested defendants to desist or refrain from further infringement of said alleged letters patent or to account to the plaintiffs for the aforesaid alleged profits or damages and deny that the defendants have failed or refused to comply with such request and any part thereof, or are now continuing or carrying on the said infringement upon said letters patent daily or threaten to continue the same or unless restrained by the Court will continue the same, and deny that plaintiffs will suffer great or irreparable injury or damage or any injury or damage at all for which plaintiffs have no plain, or speedy and adequate remedy at law.

XVI.

Further answering each of these defendants avers and alleges that the pretended improvement in mattresses mentioned in said letters patent No. 1,180,432 was not new when produced by said August Roberti, Jr., and Edward L. Roberti, but was known and previously patented, and was previously described in the United States in printed publications prior to the alleged invention thereof by the said August Roberti, Jr., and Edward L. Roberti, that is to say: the said improvements were patented previously in and by the following letters patent of the United States: [14]

Name	Number of Patent	Date
Maas,	121,723	Dec. 12, 1871
Heath,	274,495	Mar. 27, 1883
Ashby,	454,445	June 23, 1891
Micon,	1,123,345	Jan. 5, 1915
Lane,	622,239	April 4, 1899
Curlin,	691,118	Jan. 14, 1902

and such other publications not at present known by the defendants, and which defendants beg leave of this Court to set forth by amended answer when ascertained.

XVII.

Further answering, each defendant is informed and believes, and therefore alleges, that United States letters patent No. 1,180,432, dated April 25, 1916, were not the joint invention of August Roberti, Jr., or Edward L. Roberti.

XVIII.

Further answering, each defendant is informed and believes, and therefore alleges and avers that August Roberti, Jr., and Edward L. Roberti surreptitiously or unjustly obtained the patent for mattresses set forth in United States letters patent No. 1,180,432, of April 25, 1916, for that which was in fact the invention of another, to wit, Joseph Avril whose present address is unknown, but which defendants beg leave of this Court to insert by amended answer when ascertained, which Joseph Avril was using reasonable diligence in adopting and perfecting the same prior to the alleged invention of August Roberti, Jr., and Edward L.

Roberti and prior to the date of application of said letters patent No. 1,180,432.

XIX.

Further answering, each defendant avers and alleges that this suit is mere sham and pretense and a desire on the part of plaintiffs to embarrass the defendants and injure their business without just cause, and that there is no foundation in theory or fact for the alleged infringing acts complained of or for the [15] alleged unfair competitive acts complained of.

XX.

Further answering, each defendant avers and alleges that they have manufactured mattresses but that said mattresses are not an infringement of any purported letters patent granted to August Roberti, Jr., or Edward L. Roberti, and admit that they have placed the word "TIEDNOTUFT" on said mattresses, and allege that the word "TIEDNOTUFT" is their property right and that the plaintiffs have no right to the same.

XXI.

Further answering, these defendants aver and allege that the Court is without jurisdiction of these defendants or of the subject matter of the suit.

XXII.

As a separate and further defense each defendant alleges and avers that such mattresses as they have manufactured have been manufactured under and substantially in accordance with letters patent of the United States No. 1,421,274, to H. J. Malerstein, dated June 27, 1922.

WHEREFORE, each defendant prays that plaintiffs' bill of complaint herein be dismissed with costs against plaintiffs to be taxed.

JACOB H. JONAS.
MAX I. JONAS.
DAVID A. JONAS.
HARRY J. MALERSTEIN.
By J. CALVIN BROWN,
Their Solicitor.

CHANNING FOLLETTE,
RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors for Defendants. [16]

[Endorsed]: Original. In Equity—No. G–79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al. Filed Apr. 19, 1923. Chas. N. Williams, Clerk. By W. J. Tufts, Deputy Clerk. Answer. Received copy of the within answer this 19th day of April, 1923. Frank L. A. Graham, Attorney for Plaintiffs. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [17]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

PLAINTIFFS' INTERROGATORIES PURSUANT TO EQUITY RULE 58.

Pursuant to Equity Rule 58, J. H. Jonas, one of the defendants in the above-entitled cause, is required to answer the following interrogatories for the discovery of facts material to the support or defense of this cause, and to make such answers in writing, under oath, duly signed:

I.

Are you the J. H. Jonas doing business under the firm name of J. H. Jonas & Sons?

II.

If your answer to Question I is in the affirmative, state the names of all persons having an interest in the business of the firm so named.

III.

If your answer to Question I is in the affirmative, state the name of the person who directs the affairs of the firm so named.

IV.

State the connection of each person, named in your answer to Question II, with J. H. Jonas & Sons and the nature of their duties on behalf of J. H. Jonas & Sons. [18]

V.

Has the firm of J. H. Jonas & Sons any agreement relating to the business of J. H. Jonas & Sons, either oral or in writing, with any of the persons named as defendants in the above-entitled cause of action?

VI.

If your answer to Question V is in the affirmative, state the nature of any and all such agreements.

VII.

Were you associated in business with a Mr. Murdock in a company named Murdock & Jonas, Inc.?

VIII.

If your answer to Question VII is in the affirmative, was H. J. Malerstein employed by Murdock & Jonas, Inc.?

IX.

If your answer to Question VIII is in the affirmative, was it not during such employment that H. J. Malerstein first showed you a mattress constructed in accordance with the mattress shown in the Malerstein patent No. 1,421,274?

X.

Is it not a common practice for mattress makers to have used mattresses turned in, which are taken

apart either for the purpose of re-making or for salvaging parts of such mattresses?

XI.

Of your own knowledge, has H. J. Malerstein examined the construction of any other mattresses than those made by J. H. Jonas & Sons or Murdock & Jonas, Inc.?

XII.

Did you and H. J. Malerstein examine the construction of a Sanotuf mattress made by plaintiffs and discuss the construction of the same? [19]

XIII.

Did you not state to H. J. Malerstein that the mattress shown in his patent No. 1,421,274 is an infringement of the patent in suit No. 1,180,432?

XIV.

Is the firm of J. H. Jonas & Sons making or selling mattresses constructed in accordance with the mattress shown and described in the Malerstein patent No. 1,421,274?

XV.

If within your knowledge at the present time, please state the present address of Joseph Avril.

XVI.

State when Joseph Avril made the alleged invention referred to in Paragraph XVIII of your answer in the above-entitled cause of action, giving the month and year.

XVII.

State the name of the City and State where Joseph Avril made the alleged invention referred

to in Paragraph XVIII of your answer in the above-entitled cause of action.

XVIII.

State the month and year when Joseph Avril first made a mattress or portion of a mattress embodying the alleged invention referred to in Paragraph XVIII of your answer in the above-entitled cause of action.

XIX.

When did the firm of J. H. Jonas & Sons first use the word "Restamore" on mattresses?

XX.

Did you not know at the time J. H. Jonas & Sons first used the word "Restamore" on mattresses, that plaintiffs in this case had prior to such time been using the word "Restmore" on mattresses? [20]

XXI.

Do you know of the use of the words "Restmore" or "Restamore" by any other mattress maker in Southern California, that is California south of the Tehachipi Mountains?

XXII.

If your answer to Question XXI is in the affirmative, state the names of any such persons, firms or corporations.

XXIII.

Have you seen taken apart any Sanotuf mattresses made by plaintiffs?

XXIV.

If your answer to Question XXIII is in the

affirmative, state when you first saw the interior construction of such mattress.

XXV.

Is J. H. Jonas & Sons using the words "Tiennotuft" or "Restamore" on mattresses at the present time?

XXVI.

To your knowledge, did H. J. Malerstein see, prior to October 31, 1921, the interior construction of a Sanotuf mattress made by plaintiffs?

XXVII.

Is H. J. Malerstein a partner in the business of J. H. Jonas & Sons?

J. H. Jonas is required to answer each of the above interrogatories in the manner and form as stated above.

FRANK L. A. GRAHAM,
FORD W. HARRIS,
Attorneys for Plaintiffs.

Los Angeles, California, May 10, 1923. [21]

[Endorsed]: Original. No. G–79. United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants. In Equity. Plaintiffs' Interrogatories. Filed May 10, 1923. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building, Los Angeles, Cal., Attorneys for Plaintiffs. [22]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

ANSWERS TO PLAINTIFFS' INTERROGATORIES.

Comes now the defendant J. H. Jonas and answers plaintiffs' interrogatories to the best of his knowledge and belief, as follows:

I. Yes.

II. None.

III. I do.

IV. None.

V. As I understand the question, you refer to any agreement that I may have with H. J. Malerstein. I have an oral understanding with Malerstein.

VI. Said understanding relates to the manufacture of mattresses.

VII. Yes.

VIII. Yes.

IX. I do not know.

X. I am not prepared to state, not knowing.

XI. I have no knowledge.

XII. No. [23]

XIII. I do not remember.

XIV. Yes.

XV. Not prepared to state, not knowing.

XVI. Not prepared to state, not knowing.

XVII. Not prepared to state, not knowing.

XVIII. Not prepared to state, not knowing.

XIX. The word "Restamore" has never been used on any mattresses manufactured by us and sold by us, the said work only appearing in our price list; in 1917 mattresses were made to the order of a Northern firm who supplied labels to be attached to such mattresses, which labels bore the name of the Northern firm and the word "Restamore." Other than this the word has never been used on mattresses of our manufacture. We have labels with the word "Restamore" but to my knowledge have never used them.

XX. Never used it.

XXI. Not prepared to state, not knowing.

XXII. Not prepared to state, not knowing.

XXIII. No.

XXIV. No.

XXV. I am using the word "Tiednotuft" on mattresses manufactured by me, but the word "Restamore" has never appeared except as stated in answer to interrogatory XIX.

XXVI. Not prepared to state, not knowing.

XXVII. No.

J. H. JONAS.

Subscribed and sworn to before me this 18th day of May, 1923.

[Seal] J. CALVIN BROWN,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Sept. 27, 1925. [24]

[Endorsed]: In Equity—No. G–79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Answers to Plaintiffs' Interrogatories. Filed May 19, 1923. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [25]

At a stated term, to wit, the July Term, A. D. 1923, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Monday, the 1st day of October, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WM. P. JAMES, District Judge.

No. G–79—EQUITY.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

MINUTES OF COURT—OCTOBER 1, 1923—ORDER GRANTING MOTION TO AMEND ANSWER, ETC.

This cause coming on at this time for hearing on motion of defendants to amend answer and for setting for trial; Frank L. A. Graham, Esq., appearing as counsel for the plaintiff, and Calvin Brown, Esq., appearing as counsel for the defendants, it is by the Court ordered that defendants be permitted to amend their answer on condition that the costs of taking depositions, and reporter's fees, a copy for plaintiff and defendant, be paid by the defendant; and it is further ordered by the Court that this cause be set for trial for December 20th, 1923. [26]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

NOTICE OF AMENDMENT TO ANSWER OF DEFENDANTS.

To Plaintiffs, August Roberti, Jr., and Edward L. Roberti, and Their Solicitors and Counsel, Frank L. Graham and Ford W. Harris, Esqrs.:

Please take notice that on Monday, October 1, 1923, at the hour of ten o'clock A. M., in the courtroom *if* the Honorable Benjamin F. Bledsoe, in the Federal Building, Los Angeles, California, or before such other Judge or at such other time as may be appointed, defendants and each of same by their solicitors, will move this Honorable Court for an order permitting defendants to amend their answer, all in accordance with Federal Equity Rules 19 and 34, the attached amendment to answer of defendants, and supported by affidavit of J. Calvin Brown. This motion is based further upon the files, records, papers and proceedings in this cause and on the file herein.

Dated Los Angeles, Cal., Sept. 27, 1923.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants.

Good cause being shown therefor, the time of notice provided by Court Rule 8 is hereby shortened to three days.

BLEDSOE,
U. S. District Judge. [27]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

AMENDMENT TO ANSWER OF DEFENDANTS.

Now come the defendants above named, and beg leave of this Honorable Court to amend their answer as follows:

By adding paragraph VXIII-a as follows:

XVIII-a.

That upon information and belief, the defendants and each of same allege that the said August Ro-

berti, Jr., and Edward L. Roberti were not the original and first inventors or discoverers of the invention purporting to be covered by letters patent of the United States No. 1,180,432, dated April 25, 1916, or of any material or substantial part thereof, and that the same, or material, or substantial parts thereof had been in public use and on sale and known in this country prior to said alleged invention, and for more than two years before the application for said letters patent; and further, that such knowledge and use was had and used by the following named persons:

Imperial Cotton Works, a corporation of the State of California, whose principal place of business was in Los Angeles, California, and not now in existence, who so used it at Los Angeles, California; Edward W. Fox, whose residence is Lankershim, California, formerly principal owner and president of said Imperial Cotton Works, who so used it at Los Angeles, California; [28]

L. C. Alexander, whose residence is 936 West 37th Street, Los Angeles, California;

Mrs. Thomas A. Brewer, 224 E. 54th Street, Los Angeles, California;

Walter Inscho, present address unknown, but whose address defendants beg leave of this Court to insert by amended answer when ascertained;

Ray A. Garetson, Fruitvale, California, who so used it at San Diego, California;

Garetson Manufacturing Company, of San Diego, California, now bankrupt, through its officers and employees, certain of such former officers and em-

ployees being said Ray A. Garetson, and William Warren, whose present address is believed to be San Diego, who so used it at San Diego, Cal.;

Robert Hamilton and T. L. Park, whose present addresses are unknown but believed to be at San Diego, California.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants. [29]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

AFFIDAVIT OF J. CALVIN BROWN.

United States of America,
State of California,
County of Los Angeles.—ss.

J. Calvin Brown, being first duly sworn in accordance with law, deposes and says: That he is a member of the law firm of Blakeslee & Brown, and one of the counsel for the defendants above named; that he has been making diligent search

to ascertain persons and firms having prior knowledge or use of the mattress patented by August Roberti and Edward L. Roberti, being United States letters patent No. 1,180,432, dated April 25, 1916, and that the names of *a*uch persons and firms and their locations of residence were learned for the first time on the 24th day of September, 1923.

J. CALVIN BROWN.

Subscribed and sworn to before me this 27th day of Sept., 1923.

[Seal] MILDRED LEACH,

Notary Public in and for the County of Los Angeles, State of California. [30]

[Endorsed]: In Equity—No. ——. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Notice of Amendment to Answer of Defendants, Amendment to Answer, and Affidavit of J. Calvin Brown. Received copy of the within notice this 28th day of September, 1923. Frank L. A. Graham, Attorney for Plaintiff. Filed Sep. 29, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Raymond Ives Blakeslee, 727–300 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [31]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

NOTICE OF MOTION FOR BILL OF PARTICULARS.

To Plaintiff Above Named, and to Graham & Harris, Esqrs., Their Solicitors and Counsel:

Please take notice that the accompanying defendants' motion for bill of particulars will be presented before the above-entitled Court, at the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, on Monday, November 19, 1923, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard.

This motion is based upon the records, files and proceedings in this case, upon Equity Rule 20, and the case of Wilson vs. Union Tool Co., 275 Federal, 624.

Dated Nov. 2, 1923.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants. [32]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

NOTICE AND MOTION REQUIRING PLAINTIFFS TO FILE BILL OF PARTICULARS WITHIN TEN DAYS.

To Plaintiffs Above Named, and to Graham & Harris, Esqrs., Their Solicitors and Counsel:

Please take notice that on November 12, 1923, at the hour of ten o'clock A. M. in the courtroom of Judge Benjamin F. Bledsoe, in the Federal Building, Los Angeles, California, defendants upon presenting the annexed motion for bill of particulars will move the Honorable Court for an order requiring plaintiffs to serve and file their bill of particulars within ten days from and after the 12th day of November, 1923.

This motion is based upon the records, files and proceedings in this case.

Dated Nov. 2, 1923.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants. [33]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

MOTION FOR BILL OF PARTICULARS.

Come now the defendants above named and by their solicitors and counsel move the Court for an order directing the plaintiffs to file bill of particulars setting forth in detail:

I.

Which of the claims of United States letters patent No. 1,180.432 are alleged to be infringed by defendants?

II.

Which of the numerous devices made, used or sold by defendants are alleged to infringe the letters patent in suit?

III.

Of the devices specified and particularly two alleged to infringe the letters patent in suit, enumerate which ones are alleged to infringe by making, using or selling, and particularly in what manner?

IV.

Precisely what do plaintiffs assert or claim is

new or patentable in each of the claims of the patent in suit alleged to be infringed?

V.

Precisely where in defendants' alleged infringing device [34] or devices the plaintiffs assert there is found the features set forth as new and patentable in response to praragraph III hereof, and in that connection that plaintiffs:

(a) Point out by reference characters applied to a drawing or cut of defendants' alleged infringing device or devices the elements of each of the claims of the patent in suit alleged to be infringed.

(b) Point out by reference characters applied to a drawing or cut of defendants' alleged inrfinging device or devices the features set forth as new and patentable in response to paragraph III hereof.

VI.

Which of the words "Sanotuf," "Restmore," "Tiednotuft," and "Restamore" will it be contended defendants use in violation of any alleged right of plaintiffs to exclusive use of such word or words?

VII.

Of the words set forth in paragraph VI hereof how long have plaintiffs used the same, and in that connection state:

(a) The extent of use of such words or any thereof;

(b) Upon what articles they have applied such word or words;

(c) State the use of such words or any thereof,

whether in intrastate or interstate, or both, commerce;

(d) Point out and precisely state wherein there is any similarity, deceptive or otherwise, between the words "Restmore" and "Restamore";

(e) Is the word "Restmore" a registered trademark of the State of California or of the United States and contended to *belong plaintiffs* as to exclusive right to use same;

(f) Is "Restmore" a general classification or a word designating quality of mattress under a general alleged trademark "Sanotuf"? [35]

(g) Is "Sanotuf" a registered trademark of this state or the United States?

(h) Precisely in what manner does the word "Tiednotuft" alleged to be used by defendants in injury to plaintiffs, injure plaintiffs?

(i) In what manner does the word "Tiednotuft" deceive the public and trade into the belief that the mattresses alleged to be sold and made by defendants were in fact mattresses made and sold by plaintiffs?

(j) In what manner does the word "Restamore" deceive the public and trade into the belief that the mattresses alleged to be sold and made by defendants were in fact mattresses made and sold by plaintiffs?

(k) How do the plaintiffs intend to prove or show, and precisely in what manner, the intent to deceive the public and trade into the belief that the mattresses made and sold by defendants were in fact the mattresses made and sold by plaintiffs by

the alleged use by defendants of the words "Tiednotuft" and "Restamore" or either of same as set forth in plaintiffs' complaint in paragraph VIII.

(l) Which of the four words mentioned in the beginning of this paragraph VII is it contended defendants use in violation of the alleged rights of plaintiffs as set forth in paragraph X of plaintiffs' complaint?

(m) Which of the four words above mentioned are plaintiffs now using, and in that connection state:

1. The length of time of such use, stating the exact date the use of such word or words was commenced.
2. Upon what class of goods they are used.
3. Are they still using such word or words?
4. If they are still using such word or words are they still using them on the same class of goods?
5. Has any such use ever been interrupted, and if so when and for how long? [36]

VIII.

Precisely point out and distinctly state what unlawful acts have been committed by defendants in alleged violation of plaintiffs' rights which will cause plaintiffs alleged irreparable damage for which plaintiffs have no plain, speedy, or adequate remedy at law, as set forth in paragraph XI of plaintiffs' complaint, and of the said acts state the following:

(a) Precisely where the alleged acts occurred.

(b) When the alleged acts complained of occurred.

(c) And precisely what the alleged acts were.

IX.

Precisely in what manner is the reputation of plaintiffs' business in danger and its sale of mattresses by reason of any alleged acts of defendants been or will be seriously reduced as set forth in paragraph XII of plaintiffs' complaint?

X.

Of the alleged acts in paragraph X, XI and XII of plaintiffs' complaint precisely which firms and person or persons is it alleged that defendants are alleged to have deceived into believing that the mattresses made and sold by such defendants are in fact the mattresses of plaintiffs; and in that connection precisely point out:

(a) What plaintiffs intend to prove by each witness;

(b) And who such witness shall be, giving the name and address in each instance.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants. [37]

[Endorsed]: In Equity—No. G–79J. In the United States District Court, Southern District of California, Southern Division. August Roberti et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Motion for Bill of Particulars and Notice Thereof and Notice of Motion Requiring Plaintiff to File Bill of Particulars. Received copy of the within

motion this 2d day of November, 1923. Frank L. A. Graham, Ford W. Harris, Attorneys for Plaintiff. Filed Nov. 3, 1923. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [38]

At a stated term, to wit, the July term, A. D. 1923, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Monday, the 19th day of November, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. G–79–J.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

MINUTES OF COURT—NOVEMBER 19, 1923—ORDER RE BILL OF PARTICULARS.

This cause coming on at this time for hearing on motion of defendants for bill of particulars; At-

torney Graham, of Messrs. Graham & Harris, appearing as counsel for the plaintiffs and Attorney Brown of Messrs. Blakeslee & Brown appearing on behalf of the defendants, and said Attorney Brown having made a statement in support of bill of particulars and Attorney Graham, Esq., having argued in opposition thereto, it is by the Court ordered that the motion of defendant for a bill of particulars be granted as to paragraphs 1, 2, 3, 4, 5, 6, 7 and 8, except as to section (d) of paragraph 7—(h) (i) (j) (k) and sec. 3, 4, 5 of sec. (m) paragraph 7—and paragraph 9, which are denied; and paragraph #10 having been withdrawn by said Attorney Brown, it is by the Court ordered that plaintiff herein have twenty days within which to file bill of particulars. [39]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G.-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

BILL OF PARTICULARS.

Come now the plaintiffs in the above-entitled action and present this their bill of particulars:

I. Each and all of the claims.

II. While plaintiff is without knowledge as to the entire line of goods made or sold by defendant, plaintiff particularly charges infringement by the manufacture and sale by defendant of all mattresses made in accordance with the Malerstein patent No. 1,421,274 and modified forms of such mattress, also certain mattresses made or sold like defendants' mattress marked "Blue Ribbon."

III. All those enumerated in paragraph 2 above by making or selling and causing to be used.

IV. The combination set forth in each claim as a separate combination. Also the feature of inserting ties through permanent openings in the tick members. Also the feature of inserting ties through permanent openings in the upper and lower tick members to engage tabs, loops or other members secured to the respective upper and lower members. Also the feature of providing tabs, loops or extensions on the upper and lower tick members which permit [40] a tufting of the filling, leaving the tick members substantially flat. Also the feature of providing tabs, loops or extensions on the upper and lower tick members arranged to be engaged by ties whereby the filling is tufted without giving the surface of the tick members a tufted appearance. Also the provision of permanent openings in the tick members through which tufting of the filling may be made by concealed ties.

V. Reference for answer to this, as to that por-

tion marked (a), is made to Exhibit "A" attached hereto.

(b) The features new and patentable in plaintiffs' mattress also found in defendant's infringing mattress are the combinations enumerated in the respective claims as pointed out by reference letters under the answer to (a) above and in addition thereto the features scheduled under answer 4 above.

VI. Tiednotuft and Restamore are used by defendants as violation of the rights of plaintiff in the words Sanotuf and Restmore.

VII. Sanotuf and Restmore—

(a) Sanotuf—All mattresses made under the patent in suit and embracing seven different grades of mattresses.

Restmore—has been used upon a certain grade of mattress prior to the use of the word Sanotuf and subsequently to the adoption of the word Sanotuf.

(b) Mattresses.

(c) Both. [41]

(f) Restmore is used upon a certain grade of mattresses containing a certain grade of filler.

(g) Yes. U. S.

(l) Tiednotuft and Restamore.

(m) Sanotuf and Restmore.

(1) Sanotuf since on or about June 1st, 1915. Restmore since on or about the year 1903. Unable to state the exact dates.

(2) Mattresses.

VIII. Paragraph XI in bill of complaint refers to use by defendants of the words "Tiednotuft" and "Restmore" in violation of plaintiffs' rights in the words "Sanotuf" and "Restmore."

(a) In Los Angeles, California.

(b) Prior to the filing of the bill of complaint and subsequent thereto.

(c) The sale of all mattresses infringing upon plaintiffs' and marked with the words "Tiednotuft" and "Restamore."

AUGUST ROBERTI, Jr.,
EDWARD L. ROBERTI.
By FRANK L. A. GRAHAM,
FORD W. HARRIS,
Their Attorneys.

Note.—The numbering of the above paragraphs corresponds to the numbering of the paragraphs in motion for bill of particulars. [42]

EXHIBIT "A."

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

1. A mattress comprising:
   - A. an upper tick member;
   - B. a lower tick member;
   - C. boxing secured to said members in such a manner as to form an enclosed tick;
   - D. filling for said tick;
   - E. ties secured to the inner surface of said members connecting said upper and lower tick members at a plurality of points;
   - F. eyelets in said tick members through which said ties may be put in place.
2. A–B–C–D–
   - G. upper tabs secured to said upper tick member;
   - H. lower tabs secured to said lower tick member, said tabs projecting into said filling;
   - E. ties for connecting each upper tab with a corresponding lower tab.
   - F. [43]
3. A–B–C–D–G–H–
   - E. string ties each sewn through an upper and lower tab and knotted in such a manner so *so* to form a closed loop connecting said upper and lower tabs;
   - F.
4. A–B–C–D–
   - I. reinforcing strips running across the inner surfaces of said tick members and secured thereto;

G. upper tabs secured at intervals to said reinforcing strips on said upper member;

H. lower tabs secured at intervals to said reinforcing strips on said lower member;

E. ties for connecting said tabs in pairs;

F.

5. A–B–C–D–I–G–H–

E. string ties each sewn through an upper and lower tab and knotted in such a manner so as to form a closed loop connecting said upper and lower tabs;

F.

6. A–G–E–F–

7. J. a tick;

G. and H. tabs secured to the inner side of said tick;

E. anchoring means for said tabs;

F. an eyelet in said tick above each of said tabs.

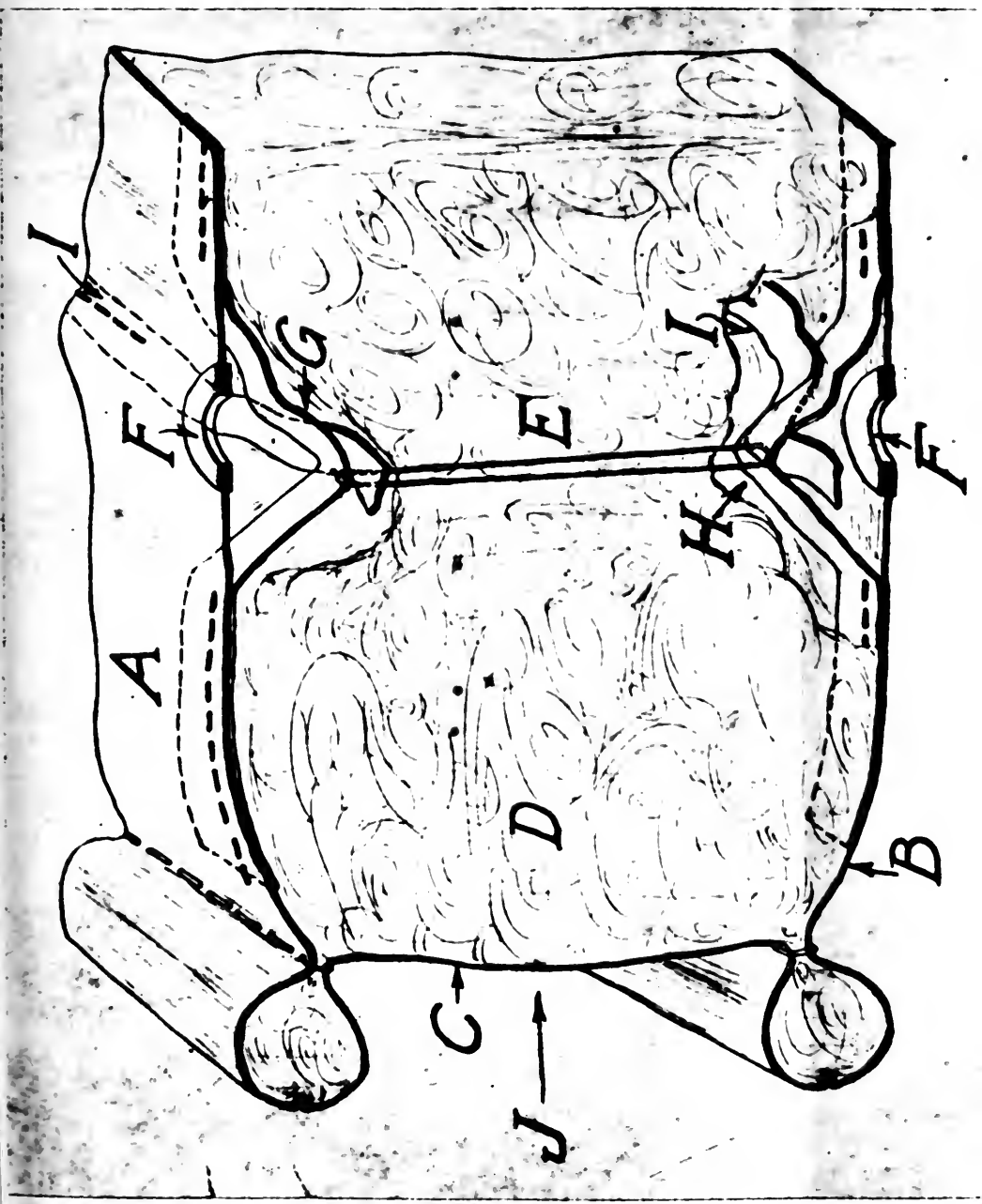
8. J.

I. a reinforcing strip secured to the inner side of said tick;

G. and H. tabs secured to said reinforcing strip;

E. anchoring means for said tabs;

F. [44]


I
A
F
G
E
H
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D
B
C
J

[Endorsed]: No. *No.* G–79. United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants. In Equity. Bill of Particulars. Received copy of within —— this 10th day of Dec., 1923. Blakeslee & Brown, Attorneys for Def. Filed Dec. 10, 1923. Chas N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building Los Angeles, Cal., Attorneys for Plaintiffs. [46]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

PETITION FOR LEAVE TO AMEND ANSWER.

Come now the defendants above named through their solicitors and counsel, Raymond Ives Blakeslee and J. Calvin Brown, and beg leave of this Honorable Court to permit the defendants to amend their answer by adding paragraph XVIII–b, as follows:

XVIII–b.

Further answering each defendant is informed and believes, and therefore alleges and avers that August Roberti, Jr., and Edward L. Roberti surreptitiously or unjustly obtained the patent for mattresses set forth in United States letters patent No. 1,180,432, dated April 25, 1916, for that which was in fact the invention of another, to wit, William R. Daniel, whose address is 117 Callisch Street, Fresno, California, which Daniel was using reasonable diligence in adopting and perfecting the same prior to the alleged invention of August Roberti, Jr., and Edward L. Roberti, and prior to the date of application of said letters patent No. 1,180,432.

Dated: Los Angeles, Cal., Dec. 12, 1923.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants. [47]

[Endorsed]: In Equity—No. G–79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Notice of Motion to Amend Answer and Amendment to Answer and Supporting Affidavits. Received copy of the within —— this 12th day of December 1923. Frank L. A. Graham, Attorney for Plffs. Filed Dec. 14, 1923. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [48]

At a stated term, to wit, the July Term, A. D. 1923, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Monday the 17th day of December, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WM. P. JAMES, District Judge.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., et al.,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

MINUTES OF COURT—DECEMBER 17, 1923—ORDER GRANTING MOTION TO AMEND ANSWER.

This cause coming before the court at this time for hearing on motion to amend answer and for hearing on motion for a continuance of trial; L. A. Graham, Esq., appearing as counsel for the plaintiffs and J. Calvin Brown, Esq., appearing as counsel for the defendants, it is by the Court ordered that the motion to amend answer be granted and that this cause be continued to February 5th, 1924, for hearing upon the payment by the defendant to the plaintiff of $250.00 as terms. [49]

At a stated term, to wit, the January Term, A. D. 1924, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Tuesday, the 3d day of June, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable WM. P. JAMES, District Judge.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS & SONS, DAVID A. JONAS, and HARRY J. MALERSTEIN,

Defendants.

MINUTES OF COURT—JUNE 3, 1924—ORDER FOR INTERLOCUTORY DECREE, ETC.

Interlocutory decree is ordered to be entered determining the validity of plaintiffs' patent as to claims 2 and 3, and that defendants have been guilty of infringement, by reason of which plaintiffs have suffered damage. Writ of injunction is ordered to be issued to prevent further acts of infringement and reference is ordered to Earl E. Moss, Esq., as Special Master to take testimony

and return findings as to the amount of damage which plaintiffs are entitled to recover by reason of acts of infringement committed by defendants. Plaintiffs to recover costs. Written opinion filed. [50]

In the District Court of the United States, Southern District of California, Southern Diision.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS & SONS, JACOB H. JONAS, MAX I. JONAS, DAVID A. JONAS, and HARRY J. MALERSTEIN,

Defendants.

OPINION.

FRANK L. A. GRAHAM, FORD W. HARRIS, Attorneys for Plaintiffs.

RAYMOND I. BLAKESLEE, J. CALVIN BROWN, Attorneys for Defendants.

Plaintiffs here, alleging themselves to be the joint inventors and owners of rights secured to them under letters patent No. 1,180.432 issued April 25, 1916, sue to restrain the defendants from infringing, and to have an accounting and damages.

The art involved is that of the construction of

bed mattresses, which are commonly made by the enclosing of hair, wool, cotton or some other soft material between upper and lower fabric covers with side boxing of like material. The evidence in the case discloses that it [51] is necessary that ties or some sort of cord shall be run through the mattress from cover to cover at intervals, which ties are of uniform length and customarily divide the top and bottom covers into rectangles or "biscuits." By the use of these ties, uniform thickness is secured and the filling of the mattress is less likely to become displaced and create unevenness. These and other advantages have made the use of ties indispensable to the manufacturer of a marketable mattress. The earlier methods included the fastening of the ends of the ties on the outer covers of the mattress, producing what is known as "tufts." It was recognized that it was desirable to dispense with these tufts, because they furnished a lodging place for dust or dirt and added to the difficulties of cleaning the mattress. To obviate this objectionable feature, the ingenuity of mattress makers was employed in the direction of discovering some means by which the ties could be placed without having a surface tuft on the covering of the mattress. Busche in 1904, in the art of cushion making, patented a method of using a button with a shank eye or thread holes which he placed between the outer cushion cover and a retaining strip sewn to the under side of the cover. Micon, In January, 1915, secured a patent upon a combination including the subdividing of the interior of the mattress

into compartments, the divisions being formed by strips or tabs fastened to the inner side of the upper and lower covers, the flap from the above meeting the flap from below and being tied to it after each compartment had been filled. Other patents have been exhibited, showing advances made in the art, including re-enforcing strips across the inner sides of the covers, as in the Van Vorst patent of May 4, [52] 1915. In none of the early combinations exhibited, either by the patents referred to or others introduced in evidence, could the complete operation of inserting and fastening the ties in a tuftless mattress, be done after the filling had been placed between the covers provided for it. Plaintiffs, in their combination, used inner tabs stitched to the inside of the mattress covers, and added an eyelet in the outside mattress covers through which to insert a mattress needle carrying the tie cord. The tabs were so fastened that when the filling was pushed into the mattress it would press the tabs squarely against the eyelet, so that when the needle was inserted it necessarily passed through the tab attached to both the upper and lower cover. The method was, after running the needle through from side to side, to bring it back, taking care that it did not pass through the same point in the tab on the return passage as on the first. Having then both ends of the tie cord on the outside of the initial eyelet, a knot would be tied which, upon being pulled through the eyelet, would in turn pull the ends of the tabs toward each other and into the mattress filling. When the desired spacing between the up-

per and lower mattress cover had been obtained, the tie cord extending from the eyelet would be cut, and the cut end pushed through out of view. The general advantageous result obtained would be a completed mattress without tufts, in which the filling could be completely placed before the insertion of any ties, and in which ties could be affixed and fastened easily and quickly.

There was nothing new or novel in the use of inner tabs or flaps sewn to the inside covers; there was—and the history of the art clearly shows this to be true— [53] novelty in the use of the eyelet in conjunction with the inner tabs or flaps. Eyelets were old, but not in the same relation. Their use in the mattress combination as embraced in plaintiffs' claims was not a matter of obvious expedient apparent to persons skilled in the art, else why, in view of the former cumbersome methods of fastening ties by hand on the inside of the unfilled mattress tick, had they not been used before? The fact that mattresses in which the eyelet is used appear to enjoy a preferential demand on the market is ample proof that they represent a pronounced advance in mattress manufacture.

Defendants, however, claim that in the making of their mattresses they used a combination essentially different different from that of the plaintiffs. They exhibit letters patent No. 1,421,274, issued on June 27, 1922, to H. J. Malerstein, who is a relative of his codefendants, and claim that their mattresses are made according to that design strictly. Malerstein made use of strips

sewn to the inner side of the mattress covers, to which he fastened his ties. These strips crossed at right angles and were stitched to the cover at each end, but were loose between the stitching points, so that when the tie was attached, the strips would depend into the mattress filling. He used the eyelet, however, placing it above (or under) the point where the strips crossed, and inserted his cord tie there through. Instead of piercing the cloth strips, as the Robertis did, he passed the cord on either side of the crossed strips. The only physical difference between his combination, or the mode of placing his ties, was in the construction of the strips and the putting of the tie on either side of the crossing point instead of through the fabric. [54]

I am of the opinion that plaintiffs' patent covers a mattress whereby tabs or their equivalents are used on the inner covers of the mattress and through which, by means of an eyelet placed in such covers, ties are inserted and fastened. I believe that claims 2 and 3 are infringed by the mattress manufactured by the defendants under the Malerstein design. The plaintiffs have not so limited the tabs used as to define them to be of particular size, shape or kind of material, and are entitled to be protected against equivalents within a reasonable range. The strips used by Malerstein perform precisely the same function in substantially the same way as the Roberti tabs. They may be stronger, by reason of their double attachment, but they are stitched to the covers and do furnish the support for the

ties, altogether similar to the Roberti tabs. Malerstein did not dispense with the eyelet, and without it his strips could not have been tied without resorting to some of the older and before mentioned cumbersome methods. It appears fairly evident that the effort of Malerstein was to take advantage of the eyelet feature of the Robertis' patent; at the same time he endeavored to make such a change in the inner attachment of the tabs as would aid his claim that there was no substantial identity to claim infringement upon. I do not think that he has succeeded in doing this. The fact that he secured a patent does not establish that his combination does not infringe the rights granted to the Robertis. The Patent Office may have considered that there was some improvement worked in his combination over that of the Robertis, but, if so, he is to be protected only in the improvement, which does not carry with it a right to make use of the [55] substance of the prior invention. If this were not true, then a patent right would be practically without value, and offer no security to the inventor.

The defense that plaintiffs were not the first inventors of their combination, because of the discovery and disclosure of Daniel in 1913, and Avril in 1916, should be decided against the defendants. Daniel filed his petition for a patent in the Patent Office in February, 1913. His design covered the construction of a mattress without eyelets. At intervals on the inner side of the top and bottom covers he stitched strips continuously across his

mattress, which were loose between the lines of stitching. He placed his ties by working a needle carrying the tie cord through the outer cover and inner strip, and through the lower cover and inner strip, bringing the needle back through the same hole of the outer cover below, working it through a different place in the two inner strips, and out the same hole in the upper strip. He then tied his knot and worked the knot through the hole in the upper cover, and worked the threads of the upper cover together so that the hole would not be visible. Against this application the Examiner particularly cited the Busche patent, and Daniel abandoned the further prosecution of his application. The Daniel disclosure without the eyelet would not effect the novelty of the Roberti combination.

Joseph Avril made an application on December 1, 1916, for a patent, and the disclosure there made is also urged in defense. It is to be noted that this application was filed about eight months after the patent of plaintiffs had been granted, and over a year after plaintiffs' application was made, which was of date February 18, [56] 1915. Evidence was introduced with the intent to prove that Avril had invented and manufactured a mattress using eyelets and tabs, prior to the time that plaintiffs claim to have originated their combination, and further, that the Avril mattress had been examined by one of the Robertis, the inference suggested being that plaintiffs had not in fact made the invention claimed, but had improperly made use of the invention of another as a basis for their patent

application. A defense of this kind, as I understand the law, must be clearly established by satisfactory evidence, and viewing all of the testimony given, this issue, I think, under that measure of proof, must be decided against the defendants. The preliminary statement of Avril, made to the Patent Office, which presumably was not disclosed to the plaintiffs until after they had made a like statement, showed that Avril claimed his invention to have been made at a time subsequent to that shown by the preliminary statement of the plaintiffs. Avril had made up an earlier design and filed on it in July, 1916. In that design he used the eyelet with the tab attached at one end only, whereas in the application of December, 1916, he attempted to differentiate from the Robertis' patent by attaching his tab at two points and tying through or around the loop, using nevertheless the eyelet.

That the Robertis were joint inventors I think is fairly established by the evidence. The issue as to the alleged unfair competition arising by use of claimed similarity of the names used by the defendants on their product to those of plaintiffs, I understand the plaintiffs to have abandoned.

From the conclusions expressed it follows that [57] an interlocutory decree should be entered determining the validity of the patent of plaintiffs as to the claims specified, and that the defendants have been guilty of infringement, by reason of which plaintiffs have suffered damage. The decree will provide further for the issuance of a writ of injunction to prevent further acts of infringeemnt, and

for a reference to Earl *F.* Moss, Esquire, as Special Master to take testimony and return his findings as to the amount of damage which plaintiffs are entitled to recover by reason of the acts of infringement committed by the defendants; plaintiffs to have all proper costs by them incurred in this behalf.

Dated this 3d day of June, 1924.

WM. P. JAMES,
District Judge.

[Endorsed]: In Equity—No. G–79. U. S. District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants. Opinion. Filed Jun. 3, 1924. Chas. N. Williams, Clerk. Murray E. Wire, Deputy. [58]

In the District Court of the United States, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS & SONS, JACOB H. JONAS, MAX I. JONAS, DAVID A. JONAS, and HARRY J. MALERSTEIN,

Defendants.

INTERLOCUTORY DECREE.

This cause having heretofore come on regularly to be heard and tried in open court before United States District Judge, Wm. P. James, upon proofs, documentary and oral, taken and submitted in the case, and being of record therein; the plaintiffs being represented by Messrs. Frank L. A. Graham and Ford W. Harris, and the defendants by Messrs. Raymond I. Blakeslee and J. Calvin Brown; and the cause having been submitted on proofs to the Court for its consideration and decision; and the Court being now fully advised in the premises, and its opinion having been rendered and filed herein;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That plaintiffs, August Roberti, Jr., and Edward L. Roberti, are the rightful owners of United States letters patent No. 1,180.432 granted April 25, 1916, entitled Non-stretching Ventilated Mattress; and said letters patent No. 1,180,432 are good and valid in law, particularly as to claims 2 and 3 thereof, and the Court makes no finding as to the validity of [59] any of the other claims of said patent.

2. That defendants, J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein, have infringed upon claims 2 and 3 of said letters patent No. 1,180,432, by making and causing to be made, and selling and causing to be

sold, and causing to be used mattresses embodying the invention patented in and by the said claims 2 and 3 of plaintiffs' patent No. 1,180,432.

3. That defendants, their officers, agents, servants, employees, and attorneys, and those in active concert or participating with them, and each of them be, and they are, and each of them is, hereby permanently enjoined and restrained from making, using or selling, or causing to be made, used or sold, any mattress or mattresses embodying or containing the invention described and claimed in and by the said claims 2 and 3 of plaintiffs' letters patent No. 1,180,-432, and each or any of said claims; and from infringing upon and from contributing to the infringement of said claims or either of them; and that a permanent writ of injunction issue out of and under the seal of this Court, commanding and enjoining said defendants, their officers, agents, servants, employees, and attorneys, and those in active concert or participating with them, and each of them, as aforesaid.

4. That plaintiffs have and recover of and from the said defendants, J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, the profits which said defendants, and each of them, have realized, and the damages which plaintiffs have sustained from and by reason of the infringement aforesaid; [60] and for the purpose of ascertaining and stating the amount of said profits and damages, this cause is hereby referred to Earl *F.* Moss, Esq., as Special Master *pro hac*

vice to ascertain, take, state and report to this Court an account of all the profits received, realized or accrued by, or to the defendants, and to assess all the damages suffered by the plaintiffs from and by reason of the infringement aforesaid; and that on said accounting the plaintiffs have the right to cause an examination of defendants, their officers, agents, servants, and employees, and each of them, *ore tenus,* and also be entitled to the production of the books, vouchers, documents and records of the defendants, their officers, agents, servants, and employees, and each of them, in connection with the accounting; and that the said defendants, their officers, agents, servants, and employees, and each of them, attend for such purpose before the Master from time to time as the Master shall direct.

5. That the plaintiffs have and recover their costs and disbursements in this suit to be hereafter taxed, and that the plaintiffs have the right to apply to the Court from time to time for such other and further relief as may be necessary and proper in the premises. Costs taxed at $60.30.

Dated at Los Angeles, California, this 5 day of June, 1924.

WM. P. JAMES,
United States District Judge.

Approved as to form, as provided in Rule No. 45.
RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Attorneys for Defendants.

Decree entered and recorded Jun. 5, 1924.

CHAS. N. WILLIAMS,
Clerk.
By Murray E. Wire,
Deputy Clerk. [61]

[Endorsed]: Original. No. G–79—Eq. United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants. In Equity. Interlocutory Decree. Filed Jun. 5, 1924. Chas. N. Williams, Clerk. By Murray E. Wire, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building, Los Angeles, Cal., Attorneys for Plaintiffs. [62]

In the District Court of the United States, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,
Plaintiffs,

vs.

J. H. JONAS, Doing Business Under the Firm Name of J. H. JONAS & SONS, JACOB H. JONAS, MAX I. JONAS, DAVID A. JONAS, and HARRY J. MALERSTEIN,
Defendants.

PERMANENT INJUNCTION.

The President of the United States, to J. H. Jonas, Doing Business Under the Firm Name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein, Their Officers, Agents, Servants, Employees, and Attorneys, and Those in Active Concert or Participating With Them, GREETING:

WHEREAS, it has been represented to us in our District Court of the United States for the Southern District of California, Southern Division, that letters patent of the United States No. 1,180,432 were granted on April 25, 1916, for Non-Stretching Ventilated Mattress, of which patent plaintiffs are the rightful owners; that said letters patent are good and valid in law and have been infringed by the defendants herein, by the [63] manufacture and sale of mattresses containing and embodying the inventions set forth in claims 2 and 3 of said letters patent No. 1,180,432,—

NOW, THEREFORE, we do hereby strictly command and permanently enjoin and restrain you, your officers, agents, servants, employees, and attorneys, and those in active concert or participating with you, from making, using or selling, or causing to be made, used, or sold, any mattress or mattresses embodying or containing the invention described and claimed in and by the said claims 2 and 3 of plaintiffs' letters patent No. 1,180,432, and each or any of said claims, and from infringing upon and

from contributing to the infringement of said claims, or either of them (in accordance with decretal provision of paragraph 3 of the Interlocutory Decree entered herein June 5th, 1924).

Hereof fail not, under penalty of the law thence ensuing.

WITNESS the Honorable WM. P. JAMES, United States District Judge for the Southern District of California, this 6th day of June, 1924.

[Seal] CHAS. N. WILLIAMS,
Clerk U. S. District Court, Southern District of California.

By R. S. Zimmerman,
Deputy Clerk. [64]

Form No. 282.

RETURN ON SERVICE OF WRIT.

United States of America,
Sou. District of Calif.,—ss.

I hereby certify and return that I served the annexed writ on the therein named David A. Jonas by handing to and leaving a true and correct copy thereof with David A. Jonas, personally, at Los Angeles, in the said District, on the 13th day of June, A. D. 1924.

A. C. SITTEL,
U. S. Marshal.
By M. J. Finn,
Deputy.

Form No. 282.

RETURN ON SERVICE OF WRIT.

United States of America,
Sou. District of Calif.,—ss.

I hereby certify and return that I served the annexed writ on the therein named Max I. Jonas and Harry J. Malerstein by handing to and leaving a true and correct copy thereof with Max I. Jonas and Harry J. Malerstein, personally, as Los Angeles, in said District, on the 9th day of June, A. D. 1924.

A. C. SITTEL,
U. S. Marshal.
By M. J. Finn,
Deputy.

Form No. 282.

RETURN ON SERVICE OF WRIT.

United States of America,
Sou. District of Calif.,—ss.

I hereby certify and return that I served the annexed permanent injunction on the therein named J. H. Jonas, doing business under the firm name of J. H. Jonas and Sons, by handing to and leaving a true and correct copy thereof with J. H. Jonas, sole owner and individua*ly* personally, at Los Angeles in said District, on the 7th day of June, A. D. 1924.

A. C. SITTEL, [65]
U. S. Marshal.
By M. J. Finn,
Deputy.

[Endorsed]: Original. Marshal's Civil Docket No. 4989, No. G–79. United States District Court, Southern District of California, Southern Division. August Roberti, Jr., and Edward L. Roberti, Plaintiffs, vs. J. H. Jonas et al., Defendants In Equity. Permanent Injunction. Filed Jun. 13, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Frank L. A. Graham, Ford W. Harris, Higgins Building, Los Angeles, Cal., Attorneys for Plaintiffs. [66]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

PETITION FOR ORDER ALLOWING APPEAL.

J. H. Jonas, Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, defendants in the above-entitled cause, conceiving themselves to be aggrieved by the order and interlocutory decree filed and entered on the 3d day of June, 1924, whereby it was ordered, adjudged and decreed that defendants were guilty of infringement of

plaintiffs' letters patent and particularly as to claims 2 and 3 thereof, as in said interlocutory decree set forth, now come Raymond Ives Blakeslee and J. Calvin Brown, solicitors for defendants, and petition said Court for an order allowing defendants to prosecute an appeal from said interlocutory decree to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and for the reasons specified in the assignment of errors which are filed herewith; and also that an order be made fixing the security which defendants shall give and furnish upon such appeal; and that a citation issue as provided by law, and that a certified transcript of the record, proceedings and papers upon which said interlocutory decree was based be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, together with the exhibits on file in this cause, in accordance with the Rules in Equity promulgated by the Supreme Court of the United States and the Statutes made and provided.

Dated Los Angeles, Cal., July 2, 1924.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants. [67]

[Endorsed]: In Equity—No. G–79. In the United States District Court, Southern District of California, Southern Division. Roberti et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Peti-

tion for Order Allowing Appeal, Filed Jul. 2, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., J. Calvin Brown, Solicitors for Defendants. [68]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

ORDER ALLOWING APPEAL.

In the above-entitled cause, the defendants having filed their petition for an order allowing an appeal from the order of this Court made and entered June 3, 1924, together with assignment of errors, now upon motion of J. Calvin Brown, a solicitor for defendants,—

IT IS ORDERED that said appeal be and hereby is allowed to defendants to the United States Circuit Court of Appeals for the Ninth Circuit, from the said order or interlocutory decree made and entered by this Court in this cause on June 3, 1924, wherein and whereby the validity of plaintiffs'

patent as to claims 2 and 3 was determined, and that defendants have been guilty of infringement thereof, by reason of which plaintiffs have suffered damage; the granting of an injunction and further awarding costs to plaintiffs, and that the amount of defendants' bond on said appeal be, and the same is hereby fixed at the sum of $250.

IT IS FURTHER ORDERED, that upon the filing of said security a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the rules in Equity by the Supreme Court of the United States promulgated and in accordance with the statutes made and provided, together with exhibits on file in this case, or duly certified copies thereof.

Dated Los Angeles, Cal., July 2, 1924.

WM. P. JAMES,
Judge. [69]

[Endorsed]: In Equity—No. G-79. In the United States District Court, Southern District of California, Southern Division. Roberti et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Order Allowing Appeal. Filed Jul. 2, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal. J. Calvin Brown, Solicitors for Defendants. [70]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

ASSIGNMENT OF ERRORS.

Come now the defendants above-named, and specify and assign the following as the errors upon which they will rely upon their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory decree or order of June 3, 1924, granting an injunction against said defendants as in said interlocutory decree set forth; that said District Court of the United States for the Southern District of California, Southern Division, in making and entering said decree erred as follows:

I.

In entering any decree in favor of plaintiffs.

II.

In adjudging and decreeing that claims 2 and 3 of plaintiffs' patent in suit No. 1,180,432 or said patent in any respect, is or are good and valid in law or in any respect.

III.

In adjudging and decreeing that said patent or any claims thereof have been or are infringed by defendants in any respect whatsoever, as referred to in the last paragraph of said interlocutory decree, or in any manner or by any device sold by defendants.

IV.

In ordering, adjudging and decreeing that plaintiffs [71] have and recover from the defendants plaintiffs' costs and disbursements in said cause.

V.

In ordering, adjudging and decreeing that plaintiffs recover from defendants any damages caused as *per its received* by reason of said defendants' infringement of said plaintiffs' letters patent and in ordering any accounting to that end.

VI.

In ordering, adjudging and decreeing that plaintiffs were entitled to an injunction as prayed for.

VII.

In not ordering, adjudging and decreeing that defendants were entitled to costs as prayed for.

VIII.

In not ordering, adjudging and decreeing that the bill of complaint in said cause be dismissed without costs and disbursements to defendants.

IX.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and claims 2 and 3 thereof were void for want of invention.

X.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and claims 2 and 3 thereof were void because anticipated, that is for want of novelty.

XI.

In not ordering, adjudging, and decreeing that said Roberti letters patent in suit and all the claims thereof and particularly claims 2 and 3 found infringed are void because of prior invention and disclosure to said plaintiffs of the invention of plaintiffs' patent by Joseph Avril. [72]

XII.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and all the claims thereof and particularly claims 2 and 3 found infringed are void because of prior invention and disclosure to said plaintiffs of the invention of plaintiffs' patent by William R. Daniel.

XIII.

In not ordering, adjudging and decreeing that said claims 2 and 3 of said Roberti letters patent should be strictly construed in view of the file-wrapper so that defendants' structure does not infringe such claims.

XIV.

In not ordering, adjudging and decreeing that the mattress manufactured by defendants under the Malerstein patent No. 1,421,274 is not anticipated by Roberti letters patent.

XV.

In not ordering, adjudging and decreeing that

claims 1, 6 and 7 of the Roberti letters patent in suit are void, because anticipated, that is, for want of novelty.

XVI.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and claims 1, 6 and 7 are void for want of invention.

XVII.

In not ordering, adjudging and decreeing that said Roberti letters patent in suit and claims 1, 6 and 7 should be narrowly construed in view of the limitations in the file-wrapper of such patent.

XVIII.

In dismissing and overruling the defendants' motion to dismiss plaintiffs' bill of complaint and assessing $20.00 as terms against defendants. [73]

XIX.

In not ordering, adjudging and decreeing that plaintiffs' bill of complaint should be dismissed pursuant to Equity Rule 29 for attempted joinder in one cause of action of a cause over which the Court has jurisdiction with one over which it has not jurisdiction, viz.: patent infringement and unfair competition.

XX.

In not finding that defendants made out each of the defenses interposed to the bill of complaint of plaintiffs.

XXI.

In adjudging and decreeing that August Roberti and Edward L. Roberti are joint inventors of the letters patent in suit.

XXII.

In order that the foregoing assignment of errors may be and appear of record, defendants present the same to the Court and pray that such disposition may be made thereof and in accordance with the laws of the United States thereunto provided.

WHEREFORE, all the said defendants pray that the said interlocutory decree of this Court made and entered on June 3, 1924, and the injunction thereby granted and ordered be reversed and set aside, in each and every particular respect, and that said Court be thereunto ordered to enter a decree ordering and adjudging the said Roberti letters patent to be void and not to have been infringed by these defendants, and that the bill of complaint in this cause be dismissed at the cost and expense of plaintiffs, and for such other and further relief and such further proceedings in this Court as by the Honorable United States Circuit Court of Appeals for the Ninth Circuit may be found meet and proper and may be [74] ordered. All of which is respectfully submitted.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants.

[Endorsed]: In Equity—No. G–79. In the United States District Court, Southern District of California, Southern Division. Roberti et al., Plaintiffs, vs. J. H. Jonas et al., Defendants. Assignment of Errors. Filed Jul. 2, 1924. Chas N. Williams, Clerk. By L. J. Cordes, Deputy Clerk.

Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [75]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein, defendants in the above-entitled suit, in the penal sum of Two Hundred Fifty Dollars ($250.00) to be paid to said August Roberti, Jr., and Edward L. Roberti, their successors and assigns, which payment well and truly to be made the Maryland Casualty Company binds itself, its successors and assigns, firmly by these presents.

Sealed with the corporate seal and dated this 3d day of July, 1924.

The condition of the above obligation is such that whereas the said defendants of the above-entitled suit, are to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered and entered on the 3d day of June, 1924, by the District Court of the United States, for the Southern District of California, Southern Division, in the above-entitled cause, by which infringement by defendants was found [76] of plaintiff's letters patent and particularly as to claims 2 and 3 thereof, and whereby an injunction was ordered and costs allowed plaintiffs.

NOW, THEREFORE, the condition of the above obligation is such that if said J. H. Jonas, doing business under the firm name of J. H. Jonas & Sons, Jacob J. Jonas, Max I. Jonas, David A. Jonas and Harry J. Malerstein shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the signature of said principal is hereunto affixed and the corporate name of said surety is hereunto affixed and attested by its duly authorized attorneys-in-fact, and the seal of said surety is hereunto affixed, at Los Angeles, California, this 3d day of July, 1924.

The first year's premium on this bond is $10.00.

MARYLAND CASUALTY COMPANY.

[Seal] By PIERCE J. DEASY,
Attorney-in-fact.

State of California,
County of Los Angeles,—ss.

On this 3d day of July, in the year one thousand nine hundred and twenty-four, before me, Mary C. Fausony, a notary public, personally appeared Pierce J. Deasy, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the Maryland Casualty Company, and acknowledged to me that he subscribed the name of the Maryland Casualty Company thereto as principal and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

[Seal] MARY C. FAUSONY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 18, 1928. [77]

Approved as to form, as provided in Rule 29.

FRANK L. A. GRAHAM,
FORD W. HARRIS,
Solicitors for Plaintiff.

I hereby approve the foregoing bond, 3d day of July, 1294.

WM. P. JAMES,
Judge or Clerk.

[Endorsed]: In Equity—No. G–79. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al, Plaintiffs, vs. J. H. Jonas et al., Defendants. Bond on Appeal. Filed Jul 3, 1924. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants. [78]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs-Appellees,

vs.

J. H. JONAS et al.,

Defendants-Appellants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Court:

Please prepare and certify transcript of record on appeal in the above-entitled cause, in accordance with the annexed stipulation and order filed herewith, and certify the same to the United States Circuit Court of Appeals for the Ninth Circuit, pur-

suant to the order of this Court allowing appeal herein, together with all the exhibits in this case.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants-Appellants.

[79]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs-Appellees,

vs.

J. H. JONAS et al.,

Defendants-Appellants.

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL AND EXHIBITS.

Defendants having taken an appeal in this suit to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory decree of June 3, 1924,

IT IS HEREBY STIPULATED AND AGREED:

Both parties to this suit so desiring, the provisions of Equity Rules 75, 76 and 77, excepting the second paragraph of Rule 76, promulgated by the United States Supreme Court, applicable to appeals are hereby waived; that the testimony in this cause be reproduced for the transcript in question and

answer form, to preserve the exact form and substance of the same; and that the reporter who reported the proceedings on the trial herein, file with the Clerk of this Court, for the transcript, and to be part thereof, at the expense of the defendants, a certified copy of the testimony and proceedings adduced at the trial and in the exact form so reported.

That the transcript shall further include a true and correct copy of all the appeal papers, this stipulation, and the order of the Court hereon, and the following papers and records in this cause on file in the office of the Clerk of this Court, to wit:

The bill of complaint herein; the answer of defendants; plaintiffs' interrogatories; answers to plaintiffs' interrogatories; order allowing amendment of defendants' answer on condition [80] that defendants pay cost of taking depositions; reporter's fees, etc.; amendment to answer of defendants Oct. 1, 1923; notice and motion for bill of particulars; order of November 19, 1923, granting motion for bill of particulars, etc.; bill of particulars of plaintiffs; petition for leave to amend answer filed with notice of motion to amend answer, dated December 14, 1923; order granting motion to amend answer and continue for hearing upon terms, etc., entered December 17, 1923; order for entry of interlocutory decree, dated June 3, 1924; memorandum opinion of June 3, 1924; interlocutory decree filed June 5, 1924; writ of injunction issued June 6, 1924; permanent injunction filed June 13, 1924; petition for order allowing appeal; order allowing appeal

and fixing amount of bond; assignments of error; bond on appeal; praecipe for transcript of record; stipulation as to transcript of record and exhibits; citation; and all orders extending time to docket cause and file record.

All the above shall constitute, together with book of exhibits hereinafter mentioned, the transcript of record of said cause on appeal, upon which record said appeal shall be heard and determined, which transcript, except said book of exhibits, shall be certified by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER STIPULATED AND AGREED:

That all the physical and documentary exhibits filed by either party herein, save Plaintiffs' Exhibit 4 and Defendants' Exhibit "U" shall be forthwith transmitted by the Clerk of this Court at the expense of defendants, to the Clerk of said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, for use in said appeal, and that the appellants may be relieved from printing the original documentary exhibits in this case, including plaintiffs-appellees' exhibits 1, 2, 5, 6, 7, 8 [81] and 10; and defendants-appellants' exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," "O," "P," "Q," "R," "T"; provided the appellants appropriately arrange and bind said original documentary exhibits

in convenient form with pages numbered and indexed, for the consideration of the Court.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Defendants-Appellants.

FRANK L. A. GRAHAM,
_____,
Solicitors and Counsel for Plaintiffs-Appellees.

It is so ordered this 17 day of December, 1924.

WM. P. JAMES,
United States District Judge, Southern District of California.

[Endorsed]: No. G–79—In Equity. In the United States District Court, Southern District of California, Southern Division. August Roberti, Jr., et al., Plaintiffs-Appellees, vs. J. H. Jonas et al., Defendants-Appellants. Praecipe and Stipulation as to Transcript of Record on Appeal and Exhibits, Filed Dec. 19, 1924. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Defendants-Appellants. [82]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Chas. N. Williams, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing typewritten pages, numbered from 1 to 82, inclusive, comprised in one volume, and a second volume, numbered from 1 to 325, inclusive, to be full, true and correct copies of the following:

Bill of complaint;

Answer;

Plaintiffs' interrogatories;

Answers to Plaintiffs' interrogatories;

Order allowing amendment of defendants' answer on condition that defendants pay cost of taking depositions, reporter's fees, etc.;

Amendment to answer of defendants, including notice;

Notice and motion for bill of particulars;

Order of November 19, 1923, granting motion for bill of particulars, etc.;

Bill of particulars of plaintiffs;

Petition for leave to amend answer, filed with notice of motion to amend answer, dated December 14, 1923;

Order granting motion to amend answer and continuing for hearing upon terms, etc., entered December 17th, 1923;

Order for entry of interlocutory decree, dated June 3, 1924;

Memorandum opinion of June 3, 1924;

Interlocutory decree filed June 5, 1924;

Permanent injunction, issued June 6, 1924, and filed June 13, 1924;

Reporter's transcript of testimony and proceedings on trial;

Petition for order allowing appeal;

Order allowing appeal and fixing amount of bond;

Assignment of errors; [83]

Bond on appeal, and

Praecipe for transcript of record, including stipulation as to transcript of record and exhibits,—

and that the same together constitute the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in said cause. Said record also contains the original citation.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the

foregoing record on appeal amount to $95.25, and that said amount has been paid me by the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 31st day of December, in the year of our Lord one thousand nine hundred and twenty-four, and of our Independence the one hundred and forty-ninth.

[Seal] CHAS. N. WILLIAMS,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R. S. Zimmerman,
Deputy Clerk. [84]

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[1] In the District Court of the United States for the Southern District of California, Southern Division.

Before Hon. WILLIAM P. JAMES, Judge Presiding.

IN EQUITY—No. G–79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON TRIAL.

Filed Dec. 22, 1924. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk.

Los Angeles, California, February 5, 6 and 7, 1924.

[1½] In the District Court of the United States for the Southern District of California, Southern Division.

Before Hon. WILLIAM P. JAMES, Judge Presiding.

IN EQUITY—No. G-79.

AUGUST ROBERTI, Jr., and EDWARD L. ROBERTI,

Plaintiffs,

vs.

J. H. JONAS et al.,

Defendants.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON TRIAL.

APPEARANCES:

For the Plaintiffs: Messrs. GRAHAM & HARRIS.

For the Defendants: Messrs. BLAKESLEE & BROWN.

Los Angeles, California, February 5, 6 and 7, 1924.

INDEX.

Defendants' Witnesses (Surrebuttal):

Plaintiffs' Exhibits:

Defendants' Exhibits:

[2] Los Angeles California, Tuesday, February 5, 1924, 10 A. M.

The COURT.—Roberti vs. Jonas.

Mr. GRAHAM.—Ready.

Mr. BROWN.—Ready.

The COURT.—Proceed.

Mr. GRAHAM.—If your Honor please, this is a suit for infringement of patent. This patent is on a non-stretching and ventilated mattress, the invention of August Roberti, Jr., and Edward L. Roberti, the patent being granted April 25, 1916.

The bill of complaint, in addition to the allegation respecting infringement, also charges unfair competition.

To give a little outline of the history of this case: A motion was made to dismiss the bill on the ground of improper joinder of the charges of infringement and unfair competition. We stated at that time that the charge of unfair competition was not relied upon as a separate cause of action but simply as showing aggravation of the charge of infringement. The motion to dismiss was denied.

Now, this invention is a meritorious one. It is not a suit on what we can call a paper patent, but it is a suit on a patent the invention of which has gone [3] into widespread use not only by the plaintiffs in the case, who are the inventors and patentees, but also by a number of licensees. Ever since the issuance of the patent these mattresses have been manufactured and sold.

To understand this invention I think it would be well to call the Court's attention to the ordinary form of mattress, which we know as a tufted mattress, that is, a mattress having outside tufts consisting of small buttons of leather or other material, the mattress being sewed entirely through from one side to the other, and through these tufts, by what we call ties consisting of twine or similar material. These ties are knotted on the outside of the tufts, and the tufts being pulled together by the ties give the tufted appearance or uneven surface to the mattress as commonly made. Now, that form of mattress is objectionable for several reasons, the principal reason we can state briefly being that these tufts are easily broken off and that they also form dirt-catchers where dirt and lint accumulate in these depressed portions where the mattress is tufted. The invention in suit has entirely done away with the outside tufts, and this invention, by the peculiar construction of the mattress, has permitted a new mode or a new method to be employed in making the mattress.

[4] In the upper and lower tick (exhibiting model to Court)—and this is merely for the purpose of explaining the mattress—are placed a number of eyelets. These eyelets are so arranged that they come directly over these shall strips or tabs on the interior of the mattress. Now, that tick is entirely filled with the filling, whatever it is desired to use, and after the tick is filled the sewing operation or the tufting operation takes place. That is done by passing a mattress needle

threaded with the tie through these eyelets. Passing through these eyelets the tie goes through these tabs or strips on the inside, going through the filling between the tabs or strips and out through the eyelet on the bottom of the tick. The needle is then passed upward and passes through the lower and upper tabs and the filling and out at the top.

If your Honor will look at the patent to Roberti which I have placed before you, this view, marked Fig. 2, is possibly not as plain to your Honor as to the mattress maker, so I will explain it. That filling is passed into the tick from this end. These tabs are stitched along the edge and are free at this end, so that when that filling is pushed into the mattress they are pushed down flat under these eyelets, so that when the needle is passed through the needle passes [5] through the tab or strip here and also through the tab or strip at the bottom. The needle is then brought up by the mattress maker and a knot is made on the tie and it is then pulled so that the tabs extend into the filling and is fastened together in that position by means of the tie, the ends of the tise being severed.

That figure shows, in a general way, the operation of making the tie and filling the mattress. Now, with that construction the appearance of the mattress is practically flat when compared with what we know or what we have called generally the old style or tufted mattress. We claim that the Roberti patent is basic in that character, that it provides a new method of filling the mattress and tying it. The eyelets also add to the mattress

the ventilating feature through the small openings wherever the eyelets occur.

Now, in the patent there are a number of advantages set forth due to this new construction. They are found on the first page of the specifications, beginning with line 10 and extending to line 53. I will just call your Honor's attention to those in a general way. The first one is that the mattress will permanently retain its shape without spreading due to the flattening of the tufting. In making a mattress under the old method I understand that it is necessary to make an extra allowance for the tufting, or the goods that is [6] taken up by that portion of the tick which is tufted. That is not necessary in making a mattress under the Roberti patent.

The second object refers to the ventilating spaces.

The third object is to do away with the external tufts common to the ordinary form of mattress and substitute a flat surface.

The fourth object is to provide tufting means or tie members between the upper and lower tick which are entirely concealed within the mattress and entirely protected.

The fifth object is to provide a tufting or tie means which will secure the filling against lateral displacement or shifting within the tick; that is, the tabs or strips extending into the filling and the ties connecting the tabs or strips preventing the lateral movement of the filling.

The sixth object is to provide a reinforcement of the tick so that relatively cheap material can

be used without danger of the tick wearing or stretching; and

The seventh object is to provide a mattress having a flat surface of even thickness so that full elasticity of filling is utilized and maintained.

Now, the defendants admit in their bill of complaint that they are engaged in the manufacture and sale of a [7] Mattress made under the Malerstein patent. This Malerstein patent has the eyelets and the concealed ties. In Fig. 6 is shown the tie after the building of the mattress, the tie being wholly within the mattress and concealed, and it shows the tie connected to these tabs or strips which are fastened on the inside of the mattress. In that patent, however, your Honor will notice that the ties pass around the crossed strips. We find that in the actual manufacture of that mattress the ties do not in all instances pass around those strips, but in some instances pass through them, and we will introduce one of the mattresses to show that difference.

At this time I want to call your Honor's attention to the claims; but before I speak of that I want to mention the fact that it is well known in patent law that a defense of using a later patent, or of the invention disclosed in a later patent, does not in any sense affect the question of infringement. If at all, it simply raises a presumption that there is a patentable difference in the construction shown in the later patent from that shown in the first patent. The question of infringement does not enter into the question when the

second patent is applied for and acted upon by the Patent Office. In other words, when an application for patent is made the Patent [8] Office never considers the claims in the prior patents to see whether or not the invention shown in the later patent or the later application is an infringement of any earlier patent. The question the Patent Office passes upon is whether the application shows something that is new, something that is useful and something that amounts to more than mechanical skill. In other words, it must show invention. The question of whether or not it is new is passed on by an examination of the prior patents to see whether the construction disclosed in the application is shown in the earlier patents. The question whether it is useful is very rarely raised by the Patent Office, as all constructions usually have some useful character. The question whether it is invention or not is not affected by the question of whether it infringes the prior patent. So that the fact that the defendant comes into court and says that he is making mattresses under a later patent does not have any bearing on the question of infringement.

I am not going over all the claims at this time; I simply want to call your Honor's attention to the first claim in the patent, which reads as follows:

"A mattress comprising an upper tick member—" That is the upper surface or the upper sheet of material forming the upper part of the mattress [9] (exhibiting model). "—a lower

tick member; a boxing (which is the side of the mattress) secured to the side members in such manner as to form an enclosed tick. Filling for the tick." (That is any kind of filling that may be used.) "Ties secured to the inner surface of said members connecting said upper and lower tick members at a plurality of points." (They are the ties which consist of the twine connecting the tabs or strips which are fastened to the upper and lower tick members.) "And eyelets in said tick members through which said ties may be put in place."

That is the broadest claim of the patent; the other claims are not as broad, and use the term "tabs." That is, the ties are secured to the tabs fastened to the upper and lower tick members.

We claim an infringement of all of the claims of the patent.

Mr. BROWN.—If the Court please, the defendants herein deny any infringement, and that will be our main contention.

A further contention will be that the plaintiffs herein obtained the matter for their said patent surreptitiously or unjustly from others, and we have alleged in our answer that such others are William Daniel and Joseph Avrill.

[10] We have also pleaded the prior art as showing certain structures in the prior art to prove to the Court that the invention of both of the Robertis was not generic, but specific; in other words, that it was a mere improvement over something that went before.

We have also denied any acts of unfair competition or any violation of any trademark, whether registered in the United States Patent Office or common-law trademark.

At this time I again urge our motion to dismiss that portion of the complaint which relates to unfair competition and to alleged trademark infringement, on the basis that this court has no jurisdiction over said matter. That was urged before, and I urge it again, and my reason for doing so is that a United States District Court has no jurisdiction over matters other than are specified in Section 34 of the Judicial Code. (Citing Elgin National Watch Co. vs. Ill. Watch Case Co., 179 U. S. 665, and reading therefrom.)

The COURT.—It seems to me that in the Woolwine Metal Products case which was tried in Judge Bledsoe's department the issue of unfair competition was presented along with the patent issue.

Mr. BLAKESLEE.—In that case it is true that in the supplemental bill that is pleaded along with the infringement, as an aggravation.

[11] The COURT.—Yes. That is all they claim for it here, I understand.

Mr. BROWN.—Well, that may be, but they have also joined with the patent infringement trademark infringement. It might be a common-law trademark, and my contention is that the jurisdiction of a District Court of the United States being a limited one it cannot be expanded to include other matters over which it has no jurisdiction with those over which it has jurisdiction, and the Supreme

Court in the Elgin National Watch Co. case has passed directly upon that question.

Mr. BLAKESLEE.—There was no trademark issue in that other case.

The COURT.—No.

Mr. BROWN.—Now, the parties to this suit, namely, Edward and August Roberti, as well as Mr. Jonas and others, are residents of this state. There is no diversity of citizenship, and there is no allegation in the complaint that the amount is over $3,000, which is absolutely essential.

As to trademark, the Supreme Court of the United States has also passed on that in a case reported in 201 U. S. at page 166, as follows: (Reading.)

I originally argued this motion to dismiss before Judge Bledsoe. It is true that in a case some time [12] previously, the Hadden Automatic Sprinkler vs. Hadden case, we alleged infringement of the patent and unfair competition, and in the argument when that case was presented I argued to Judge Bledsoe that unfair competition and patent infringement could be joined on the ground that unfair competition was an aggravation of patent infringement. Mr. Lyon opposed the motion, and the motion was denied,—that is, it was granted to the plaintiffs. At that time I had only consulted certain authorities, and some two or three weeks later I was consulting some Supreme Court authorities and I read this Elgin National Watch Co. case and came to the conclusion that my original contention as to the joinder of the two was erroneous, and

that it should not be permitted, and I so argued before Judge Bledsoe, but Judge Bledsoe—apparently in the argument I did not make myself clear—held that this particular case involved not only unfair competition but was attempting to inject something else in violation of the trademark law. I was going to ask the Court to pass upon the similarity of words, and my contention is that it was wrong. But it is evident that I did not make myself clear to Judge Bledsoe as to what I was attempting to do and he was of the opinion that I was rearguing my case of unfair competition and patent infringement, which was not strickly true.

[13] I repeat that I believe this court is without jurisdiction within section 24 of the Judicial Code and within the cases I have cited.

Our further contention in our answer is this case will be that neither Mr. Edward Roberti nor Mr. August Roberti really invented anything; that what Mr. August Roberti did was to surreptitiously obtain the conception of the invention from one William Daniel; that Mr. Edward Roberti, if he had any conception of an invention, or any idea, obtained it from Mr. Joseph Avrill; that the two of them combined their idea and the patent matured therefrom. Mr. Daniel filed an application for patent some twenty-two months before any alleged conception by either of the Robertis, as the preliminary statements will show which I will introduce into evidence later. The Roberti patent was involved in interference with one Joseph Av-

rill, and they both filed preliminary statements on the matter.

We also urge, if this Court denies the motion to dismiss the complaint as to those portions involving unfair competition and violation of trademark, that there has been no act of unfair competition on the part of the defendants or any of them, and that there is no similarity between the words "Sanotuf" and "Tiednotuff," either in color, size, appearance or sound, and that the word "Restmore" or "Restamore" [14] means merely a species of mattress manufacture, which is simply to determine the grade of mattress, and we will show that those words are old, by depositions we have taken in the east.

Mr. GRAHAM.—With respect to the motion to dismiss, if your Honor please, that matter was argued at length in this same case before Judge Bledsoe and has been passed upon. At that time we cited a number of cases in which the joinder of unfair competition and patent infringement has been made in the bill of complaint and sustained by the Court. The distinguishing feature in those cases, to my mind, is this—that where the acts of unfair competition are so intimately associated with the acts of infringement that they are in fact substantially the same act then it is perfectly proper to join the unfair competition and infringement; and where it pertains to the actual marking and the manner of marking the very goods which are complained of as being an infringement, in those cases

I believe the law is quite plain that a joinder of that kind is proper.

The COURT.—That is, it may be used as an aid in furthering the marketing of the infringing device.

Mr. GRAHAM.—Yes. Now if, for instance, the defendant were making mattresses that infringed plaintiffs' patent, and they were also making another [15] line of goods, we will say some kind of furniture, and plaintiff was making that same line of furniture, and there were acts of unfair competition which related solely to furniture and which had no relation to the patent, that, to my mind, would be a different proposition; but where the acts relate to and are so connected that they relate to the same article which is claimed to infringe, then it is substantially one operation or one transaction.

The case of Ross vs. Geary, 188 Fed. 731, related to the uniting of a charge of infringement of a trademark and other acts of unfair competition, and the Court said that when the wrongful acts are not separate and distinct but are all taken together as one whole or one act then the facts may be alleged and proved and the wrongful acts enjoined.

The COURT.—It is understood that the motion to dismiss is now renewed on the grounds stated. At this time I will deny the motion; not intending, however, to foreclose you upon the argument from suggesting the application of the evidence and what is to be considered when I give judgment.

Mr. GRAHAM.—I will ask Mr. Roberti to take the stand.

TESTIMONY OF EDWARD L. ROBERTI, FOR PLAINTIFFS.

[16] EDWARD L. ROBERTI, plaintiff herein, having been first duly sworn as a witness on behalf of plaintiffs, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Mr. GRAHAM.—We offer in evidence a certified copy of the patent in suit, 1,180,432, granted April 25, 1916, to August Roberti, Jr., and Edward L. Roberti, for improvement in non-stretching ventilated mattress.

(Plaintiffs' Exhibit No. 1.)

Q. Please state your name.

A. Edward L. Roberti.

Q. Mr. Roberti, you reside in the City of Los Angeles, do you? A. I do.

Q. Are you one of the patentees of the patent in suit? A. I am.

Q. At the time of the bringing of this suit who were the owners of that patent?

Mr. BLAKESLEE.—We object to that as calling for a conclusion of the witness on a matter of law. We think the proper proof should be made on the subject of title. The witness may be asked if he assigned any interest, but to ask who was the owner is calling [17] for a legal conclusion.

Mr. GRAHAM.—The question is withdrawn.

Q. This patent shows on its face that it was granted to August Roberti, Jr., and Edward L.

(Testimony of Edward L. Roberti.)

Roberti. Have you at any time prior to the bringing of suit assigned any interest in this patent?

A. No.

Q. How long have you been in the business of making mattresses, Mr. Roberti?

A. About 22 years, I think. Between 22 and 23 years.

Q. And where is your place of business?

A. No. 1346 Long Beach Avenue, Los Angeles.

Q. Have you ever adopted any names or marks for your mattresses? A. Yes.

Q. What are those names?

Mr. BLAKESLEE.—We wish to reserve an objection to this entire line of testimony subject to the ruling of the Court.

The COURT.—Yes; the objection is overruled and an exception may be shown.

A. We have five or six names for different grades of mattresses. We have one mattress by the name of "Sunrise"; and "Restmore"; "Downo"; "Standard"; "Superior"; and "Hairfelt"; and we have several others.

[18] Q. Have you used any name on the mattress made by you like the mattress shown in the patent in suit?

A. Yes; we are using the names "Restmore," "Downo," "Standard," "Superior" and "Kapot."

Q. Have you used any general name for all of these different named mattresses?

A. We have used our trademark name of "Sanotuf."

(Testimony of Edward L. Roberti.)

Q. Now, when did you first use the word "Sanotuf"?

A. I don't just recall the date. I think I will have to refresh my recollection here (examining papers taken from pocket). Our registration of "Sanotuf" was about June 1, 1915.

Q. What is that you refer to?

A. This is our United States registration of trademark.

Q. And does that contain something that refreshes your recollection as to the date?

A. Yes; I couldn't remember, without looking at this, the exact date.

Q. Now, when did you start to use the word "Restmore"?

A. The only evidence I have of that is by looking up some of our price lists and finding some of our price lists back as far as 1912.

Q. To what extent has the word "Sanotuf" been used?

[19] A. It has been used on practically our whole product of mattresses.

Q. Well, upon what mattresses have you used the word "Sanotuf"?

A. The names I have mentioned formerly there.

Q. Are those mattresses all of the same construction?

A. All of the same construction, with different fillings. The names I gave you there were the names of the filling contained in the mattresses.

Q. What territory do you cover in the sale of

(Testimony of Edward L. Roberti.)

these mattresses under the names you have mentioned?

A. California and Arizona principally.

Q. Have you advertised these mattresses under that name? A. Yes.

Q. To what extent has this advertising been done?

A. As nearly as I can take it from our books, we have spent about $30,000 in advertising since we have had the patent that has been issued.

Q. Have you any licensees under the patent in suit? A. At the present time we have six.

Q. And where are they located, speaking generally?

A. (Referring to paper.) We have one in Colorado; one in Milwaukee; one in Washington; Oregon; [20] Utah, and Idaho, and Northern California.

Q. What is that paper which you have referred to? A. That is a record of our books.

Q. Taken from your books of account?

A. Yes.

Q. Can you state, in round numbers, the number of mattresses that you and your licensees have made like that of the patent in suit?

A. Somewhere about 75,000.

Q. Now have you marked those mattresses made like the patent in suit with notice of the patent?

A. We do.

Q. Have you marked all of them with notice of patent since the patent issued? A. Yes, sir.

Q. How about your licensees?

(Testimony of Edward L. Roberti.)

Mr. BLAKESLEE.—We object to that as assuming a fact not testified to, and this objection might have been made previously. There is no testimony of any license, and no license has been pleaded; and inasmuch as the question of licensees goes to acquiescence in a patent we think it should be proven in the usual way and not assumed in a question.

Mr. GRAHAM.—We are not attempting to prove the licenses for that purpose; we are attempting simply to show the amount or number of mattresses that have [21] been made, and I think the question is proper for that purpose.

Mr. BLAKESLEE.—The question should not assume there has been a license when there is no proof of it.

(Last question read.)

The COURT.—He may answer if he knows.

A. Under our contract with them they are authorized to put the name "Sanotuf" on the mattress and also a license tag which bears the name "Sanotuf."

Mr. BLAKESLEE.—We wish to move to strike out the answer as assuming facts not testified to and not proven, inasmuch as this license question has a strong bearing on the question of acquiescence in the patent.

The COURT.—The motion is denied.

Mr. BLAKESLEE.—Exception.

Q. (By Mr. GRAHAM.) Mr. Roberti, I hand you a label and ask you what that refers to.

(Testimony of Edward L. Roberti.)

A. That is a label which we put on our "Sanotuf" mattresses.

Mr. GRAHAM.—We offer the label in evidence.

The COURT.—It may be filed.

(Plaintiffs' Exhibit No. 2.)

Q. (By Mr. GRAHAM.) Do you have any mattress made by the defendant in your possession?

A. We have one.

Mr. BLAKESLEE.—We object to that as assuming [22] facts certainly not proven.

The COURT.—Yes.

Mr. GRAHAM.—Well, I will show the defendants' counsel a mattress and ask them if they will admit that is one of the mattresses made by the defendants (exhibiting mattress). That will save time and a lot of proof.

Mr. BROWN.—We don't know anything about the mattress. All mattresses look alike to a certain extent, and we don't know the construction of the interior.

Q. (By Mr. GRAHAM.) I show you this mattress right here, Mr. Roberti, and will ask you to tell us what you know about it, and, if it has ever been in your possession, how it came into your possession.

A. We had that mattress bought from the J. H. Jonas Company for the purpose of examining it to see to what extent it was infringing upon our mattress.

Mr. BLAKESLEE.—We move to strike out that answer inasmuch as the witness has not testified as

(Testimony of Edward L. Roberti.)

to any act of his own in the purchase of this mattress. The proof should be made by some person who procured or bought it.

The COURT.—Yes, that is true. It would be hearsay otherwise.

Mr. GRAHAM.—I am only asking this witness to [23] testify as to his possession of the mattress, and the actual purchase of the mattress I will prove by another witness.

Q. How did you obtain possession of this?

The COURT.—From whom, immediately, did you get it?

A. We bought the mattress from Kaufman Brothers.

Mr. BLAKESLEE.—We object to that as—

The COURT.—It is necessary to be somewhat technical about that. Did you get it yourself?

A. We had one of our men get it.

Q. All you know is that you received it from one of your men? A. Yes.

Mr. GRAHAM.—We will offer this mattress in evidence and simply ask at this time that it be marked for identification.

The COURT.—It may be marked for identification.

Mr. BLAKESLEE.—If counsel wishes to expose the interior of the mattress, which is really the important part, we do not wish to be supertechnical. That is the only thing that moves us to be careful. If he wishes to have it ripped open and will show us the inside of it and it seems to be our construc-

(Testimony of Edward L. Roberti.)

tion, we will stipulate to it, but we do not wish to stipulate to something that is sealed to our vision.

[24] (Mattress ripped open at end and exhibited to counsel for defendants.)

Mr. BLAKESLEE.—We will stipulate that is one of the defendants' mattresses.

Mr. GRAHAM.—We will offer that mattress in evidence as Plaintiffs' Exhibit No. 3.

The COURT.—It may be so marked.

Q. (By Mr. GRAHAM.) I show you another mattress and ask you if you know what that is.

A. That is our "Sanotuf" mattress.

Mr. GRAHAM.—We offer that mattress in evidence as Plaintiffs' Exhibit No. 4.

The COURT.—It may be marked.

Q. (By Mr. GRAHAM.) I will ask you, Mr. Witness, to open the side of that other mattress.

(Witness rips mattress open.)

Q. How long have you been in the business of making mattresses, Mr. Roberti?

A. 22 or 23 years.

Q. Are you thoroughly familiar with the construction of mattresses and different parts of them?

A. I am.

Q. Will you be kind enough to point out the parts of that mattress that are similar to the parts of defendants' mattress, Plaintiffs' Exhibit No. 3?

Mr. BLAKESLEE.—We object to that as not the [25] proper method of proof, and as calling for a conclusion of the witness and not for a statement of facts. The witness should describe both. Further-

(Testimony of Edward L. Roberti.)

more, it is immaterial in that a comparison of plaintiffs' mattress with defendants' mattress is not within the issues. The comparison should be made between the patent in suit and defendants' mattress, and there is no presumption to be indulged in that plaintiffs' mattress is made like the mattress of the patent in suit. It is not the proper method of proof.

The COURT.—You may point out, Mr. Witness, on your mattress any parts that you claim are described in the patent.

A. Well, I claim that the operation of tying the mattress down is exactly the same as the way we have our operation.

Mr. BLAKESLEE.—We move to strike that out as a conclusion of the witness.

Q. (By Mr. GRAHAM.) The Court said to point out the parts in your mattress that are found in your patent.

A. (Referring to Exhibit 4 and to patent.) A mattress comprising an upper and lower tick, and side boxing,—or it doesn't have to have side boxing unless it is necessary—filled with any kind of filling, and sewing a tab on the inside, or a flap or strap of some kind, on the inside of each, upper and [26] lower, member,—

Q. Show the Court these different parts you refer to.

A. Yes. You see, here is the strap that goes across, that creates the never-stretch feature of the mattress, and then the tab which receives the twine

(Testimony of Edward L. Roberti.)

through the eyelet, which brings the mattress to a uniform thickness. Those are the main claims that we feel we are entitled to.

Mr. BLAKESLEE.—We move to strike out the last statement as a voluntary statement and not a statement of facts.

The COURT.—I suppose he means those are the points of similarity between that mattress and this patent.

The WITNESS.—Yes.

Q. (By Mr. GRAHAM.) In other words, those parts you have described are the parts described in the patent? A. Yes.

Q. The upper tick member, the lower tick member, the boxing, the ties and the fastening of those ties to the upper and lower tick member, on the inside of the tick. Is that correct?

A. Yes; to receive the twine from the outside of the tick after the mattress has been filled, so [27] that we have an invisible tufting.

Q. Now, will you look at defendants' mattress and point out the features in that that you find in your mattress?

Mr. BLAKESLEE.—We object to that as immaterial. The question is what is in the patent and what is in defendants' mattress, if anything. That is the issue here.

The COURT.—Of course it is the same thing. If he has correctly described the things he finds in his mattress, and whether he compares it with

(Testimony of Edward L. Roberti.)

what he has just described, and if his first description shows the identity. Proceed.

A. This mattress has the upper and lower tick members and the boxing, the same as ours, and it has the ties on the inside, and the never-stretch strap which goes across, and, as I mentioned before, it has the ties on the inside fastened to the upper and lower tick members to receive the twine which enters through the eyelets in order to tuft the mattress to a uniform thickness; and it has exactly the same operation as our mattress.

Mr. BLAKESLEE.—We move to strike that out as a conclusion, and move to strike out the whole answer, on the ground that the patent speaks for itself and the defendants' mattress speaks for itself and the mere [28] attempt to reach a conclusion that they are the same is not the proper method of proof. The devices of the patents speak for themselves anyway and mere oral testimony in that behalf cannot prove anything.

The COURT.—I think as a mattress man he can tell at least whether the operation of constructing the mattress would be the same in the two—that is, under his patent and under the exhibit.

Mr. BLAKESLEE.—Exception.

Q. (By Mr. GRAHAM.) Now, will you take a copy of the patent in suit and point out similarities in defendants' mattress Exhibit No. 3?

Mr. BLAKESLEE.—Same objection.

The COURT.—Yes.

A. From this patent I see the same features on

(Testimony of Edward L. Roberti.)

the inside construction as what are noted in this patent.

The COURT.—Referring to your own patent as you call it?

A. Yes. I have a copy of my own patent in my hand. I see that the pads on the inside are sewed to the upper and lower members of the tick, and they have the same twine sewing them through the eyelets, which draws the mattress to a uniform thickness, the same as our patent.

Mr. BLAKESLEE.—We move to strike that out, [29] particularly the part that states it is the same as in the patent, as a self-serving statement and conclusion and not a statement of fact and not the proper method of proof.

The COURT.—I think I will allow it to remain in. The objects are here and we can judge of that.

Mr. BLAKESLEE.—Exception.

Q. (By Mr. GRAHAM.) Now, do you find in defendants' mattress, which you are looking at, an upper tick member? A. I do.

Q. And a lower tick member? A. I do.

Q. And boxing secured by those members?

A. I do.

Q. In such manner as to form a closed tick?

A. I do.

Q. Do you find filling for said tick? A. I do.

Q. Do you find ties secured to the inner surface of said members connecting said upper and lower tick members at a plurality of points? A. I do.

(Testimony of Edward L. Roberti.)

Q. Eyelets in the tick members through which the ties may be put in place? A. I do.

[30] Q. Now, do you find tabs in this defendants' mattress?

A. There are strips that are put into loops which act for the same purpose.

Mr. GRAHAM.—We offer in evidence at this time, if your Honor please, a carbon copy of a letter written to J. H. Jonas & Sons, 5805 South Park Avenue, by the firm of Graham & Harris, calling their attention to the ownership of the patent in suit and the fact that they are infringing the patent. I understand there is no objection to that copy being offered.

The COURT.—Very well.

(Plaintiffs' Exhibit No. 5.)

Mr. GRAHAM.—You may take the witness.

Mr. BLAKESLEE.—No cross-examination.

TESTIMONY OF FRED W. WIDER, FOR PLAINTIFFS.

[31] FRED W. WIDER, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Please state your name.

A. Fred W. Wider.

Q. What is your business?

A. Furniture business.

(Testimony of Fred W. Wider.)

Q. Where are you located?

A. No. 2110 Sunset.

Q. Do you handle mattresses and articles of that kind in your business? A. Yes, sir.

Q. Have you had any dealings with the defendants J. H. Jonas & Sons? A. I have not.

Q. Have you ever had any dealings with them at all? A. No, sir.

Q. Have you ever had any conversation with them? A. Yes, sir.

Q. With whom did you have such a conversation?

A. Jonas, Jr. I expect it was him; he said it [32] was.

Q. And where did that conversation take place?

A. At my store.

Q. Was there anyone else present?

A. Not that I can recall.

Q. What was that conversation?

A. He came in to sell mattresses.

Q. Well, relate the conversation as nearly as you can remember it.

A. He came in one day and wanted to know if I wouldn't buy some "Sanotuf" mattresses. I said to him "Sanotufs"? He said, "Yes." Well, I told him I supposed Roberti Brothers were the only ones that made the "Sanotuf." "Well," he said, "Ours is just like it." And I said "Under the same name?" And he said "No, we call our mattress the 'Tiednotuff.'"

Q. And he made the statement to you that their

(Testimony of Fred W. Wider.)

mattress was just like the "Sanotuf" made by Roberti Brothers? A. Yes, sir.

Mr. GRAHAM.—That is all.

Cross-examination.

(By Mr. BLAKESLEE.)

Q. When did you say this conversation took place? A. It must have been a year ago.

Q. Do you remember the month?

[33] A. No, sir. He was in several times; not only once.

Q. Came into your place of business?

A. Yes, sir.

Q. Do you remember at which of these several times that statement was made?

A. He called it "Sanotuf" at least three times—at least two or three times. He came in and wanted to know if we wanted to buy "Sanotuf" mattresses.

Q. Do you mean Mr. Jonas, the defendant?

A. Well, Mr. Jr. That is, he said he was the Jr.

Q. Had you met Mr. Jonas before that time?

A. No, sir.

Q. Is he in the room here to-day? Do you see him? A. I do not see him.

Q. Do you know that it was Mr. Jonas's son?

A. Only from what he said.

Q. You have never seen him at the place of business of the defendants, have you?

A. No, sir.

Q. Have you ever been there? A. No, sir.

(Testimony of Fred W. Wider.)

Q. Do you know the salesmen of the plaintiffs, the Roberti people? [34] A. I do.

Q. All of them?

A. I know the salesman Mr. Dort.

Q. Did you transact any business with this man who said he was Jonas, Jr.?

A. No, sir; I never bought from him.

Q. Did you believe that the defendant was selling the same kind of mattresses?

A. I didn't consider it at all.

Q. You didn't act on it at all, did you?

A. No, sir.

Q. You didn't utilize his statement in any way in your business or make any purchase or do anything at all?

A. I did not. That is, I never bought from him.

Q. As far as you actually know that might have been somebody else besides Jonas, Jr., might it not?

A. It might have been. He told me he was Jonas, and that is all I know. I never had been introduced to him.

Mr. BLAKESLEE.—We move to strike out that testimony as merely hearsay unless it can be connected up in some way.

Mr. GRAHAM.—This Jonas, Jr., is one of the defendants in the suit.

Mr. BLAKESLEE.—Anybody might represent the [35] defendant.

Mr. BROWN.—It was after the commencement of the suit, something like a year ago.

(Testimony of Fred W. Wider.)

Q. (By the COURT.) Would you know the person if you saw him?

A. Why, I believe so. It was over a year ago since he was in. He did call several times, and I told him there was no need of calling because I wouldn't buy his goods.

Q. (By Mr. BLAKESLEE.) Can you describe him?

A. He was a Jewish man, the same as—a great many of them look alike.

Q. Well, what was his height?

A. Slim, and medium tall,—

Q. Smooth face? A. I believe so.

Q. You don't remember?

A. Not exactly, no. That is a year ago.

Q. You would know him if you saw him?

A. I think I would.

Mr. BLAKESLEE.—We move to strike out the testimony as not establishing any definite identity.

The COURT.—It will be allowed to remain in subject to its being shown that the person was the person he represented himself to be.

Mr. GRAHAM.—Will counsel have Mr. Jonas, Jr., [36] in court this afternoon?

Mr. BLAKESLEE.—Yes, we will have him here this afternoon.

Mr. GRAHAM.—I will ask Mr. Silk to take the stand.

TESTIMONY OF ROBERT P. SILK, FOR PLAINTIFFS.

[37] ROBERT P. SILK, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Please state your name.

A. Robert P. Silk.

Q. What is your business?

A. Furniture business.

Q. Located in Los Angeles? A. Yes, sir.

Q. Do you handle mattresses? A. Yes, sir.

Q. Have you ever had any dealings with J. H. Jonas & Sons or any of their representatives?

A. We have bought other things from them besides mattresses.

Q. So that that you have had some actual business dealings with J. H. Jonas & Sons?

A. Yes, sir.

Q. Did you ever have any conversations with any of their representatives relating to mattresses?

A. Mr. Max Jonas has been in the store on several different occasions. He has asked me to put in his line that he called the "Tiednotuff" mattress.

[38] Q. This Mr. Max Jonas you refer to, is he the man who negotiated with you and sold you some of their goods that you mentioned in your previous answer? A. Yes, sir.

(Testimony of Robert P. Silk.)

Q. What was the conversation relating to mattresses?

A. Max has been in the store several times asking me to put his mattresses in, and I asked him what kind of mattresses he had, and he said "We are putting out a new mattress that we call the 'Tiednotuff' "; and I says, "Do you handle a 'Sanotuf' mattress?" And he said, "Yes"; and he says, "This is the same as the 'Sanotuf.' " He even went further and says, "We are substituting the 'Tiednotuff' for the 'Sanotuf' if we are out of the other brand."

Q. And did you buy any of these mattresses?

A. No, sir.

Q. You are positive, however, that this man that made the representation to you about the "Tiednotuff" mattress that you have just testified to is the Max Jonas who sold you the goods for Jonas & Sons? A. Yes, sir.

Mr. GRAHAM.—That is all.

[39] Cross-examination.

(By Mr. BLAKESLEE.)

Q. When did these representations about "Tiednotuff" take place?

A. It was about a year ago, or possibly 14 months.

Q. What did you understand by the statement that the "Tiednotuff" was the same as the "Sanotuf"? Do you mean it was the same mattress and had filling in it, or how far did you understand it to be the same?

(Testimony of Robert P. Silk.)

A. The way he represented it to me was that the general appearance of the mattress was so similar that a person that wasn't versed in the technicalities of mattresses couldn't tell the difference between them.

Q. In other words the external appearance, the part you would see in looking at a complete mattress; is that it? A. Yes.

Q. Now, isn't that true of most of the mattresses you handle as far as the make-up is concerned, that there is a tick and side walls and tufts?

A. No. Several mattresses have their distinguishing features. Mr. Roberti makes a mattress he calls the "Sanotuf"; that is different from the [40] other mattresses that have an eyelet in the tick.

Q. Did Mr. Max Jonas specify the eyelet when he spoke of the resemblance of the "Tiednotuff" mattress to the "Sanotuf"?

A. Yes, he said it was just the same.

Q. Did he mention the eyelets?

A. Well, no, he didn't mention the eyelets. He said it was a "Sanotuf" mattress.

Q. He didn't mention any details?

A. Yes, he said it was the same construction.

Q. He didn't mention any details specifically, any part of the construction, did he? A. No.

Mr. BLAKESLEE.—That is all.

Mr. GRAHAM.—Plaintiff rests its *prima facie* case.

[41] Mr. BROWN.—In accordance with the answer filed pleading the prior art and also with reference to the defendants Daniel and Avrill, we wish at this time to introduce in evidence as Defendants' Exhibit "A" a certified copy of the file-wrapper and contents of the application of August Roberti and Edward L. Roberti. There has already been a copy introduced, but this is complete.

Mr. GRAHAM.—Does that Exhibit "A" include the copies of the patents?

Mr. BROWN.—No; just the actions of the Patent Office.

Likewise, as Exhibit "B," a certified copy of the file-wrapper and contents, not including the cuts, of the application of Joseph Avrill for improvements in mattresses, filed December 1, 1916, bearing serial number 134,472.

Mr. GRAHAM.—We object to the offer. The allegation in the answer respecting the Avrill defense is that the two Robertis surreptitiously or unjustly obtained a patent for the mattress of the patent in suit which was in fact the invention of another. Now, this in itself is not proof under that pleading; this is merely a certified copy of the application of Joseph Avrill and is not proof of invention.

Mr. BROWN.—It is merely one step, if the Court [42] please, which will be connected up with oral proof.

Mr. GRAHAM.—The materiality of it has not been shown at this time.

The COURT.—The objection is overruled.

Mr. GRAHAM.—Exception.

Mr. BROWN.—Likewise we offer a certified copy of the application for patent of Joseph Avrill filed in the United States Patent Office July 25, 1916, bearing serial number 111,163, as Defendants' Exhibit "C."

Also, as Defendants' Exhibit "D," I wish to introduce into evidence a certified copy of the file-wrapper and contents, not including patents cited, of the application of William R. Daniel filed February 25, 1913, serial number 750,512.

I also wish to offer in evidence at this time certified copy of the preliminary statement of Joseph Avrill, which Avrill was involved in interference with August Roberti and Edward L. Roberti at the time Mr. Avrill attempted to prosecute his case before the United States Patent Office, being an interference between Mr. Roberti's patent, which is now in suit, and Mr. Avrill's, patent application, as Defendants' Exhibit "E."

Likewise I offer in evidence the preliminary statement of August and Edward L. Roberti, as [43] Defendants' Exhibit "F."

We have also pleaded the prior art in our answer, and we have a stipulation as to the use of printed copies, but as we have obtained certified copies I will introduce those. As Defendants' Exhibit "G" we wish to introduce into evidence certified copy of the patent of Louisa Ashby, 545,445, granted June 23, 1921.

Also a certified copy of the patent to Charles W. Curlin, 691,118, granted January 14, 1902, as Defendants' Exhibit "H."

Also patent to Laban Heath, 274,495, granted March 27, 1883, as Defendants' Exhibit "I."

Also patent to John J. Lane, 622,239, granted April 4, 1889, as Defendants' Exhibit "J."

Also patent to Jacob Maas, 121,723, granted December 12, 1917, as Defendants' Exhibit "K."

Also patent to David Micon, 1,123,345, granted January 5, 1915, as Defendants' Exhibit "L."

Likewise, as showing the state of the prior art, and which patents are not specifically pleaded in the answer, we have five patents, namely:

Patent to Van Vorst et al., 1,138,264, dated May 4, 1915, which we offer as Defendants' Exhibit "M."

Likewise patent to Forwood, 881,851, dated March 10, 1908, as Defendants' Exhibit "N."

Also patent to Busche, 765,377, dated July 19, [44] 1904, as Defendants' Exhibit "O."

Also patent to Fournier, 624,638, dated May 9, 1899, as Defendants' Exhibit "P."

Also patent to Heffner, 1,029,928, dated June 18, 1912, as Defendants' Exhibit "Q."

Certain of the last five patents mentioned, which are introduced to show the state of the prior art, were cited by the Examiner during the prosecution of the Roberti patent, and others were cited in connection with the Daniel application for patent.

Mr. BLAKESLEE.—I will ask Mr. Malerstein to take the stand.

TESTIMONY OF HARRY J. MALERSTEIN, FOR DEFENDANTS.

[45] HARRY J. MALERSTEIN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BLAKESLEE.)

Q. Please state your name.

A. Harry J. Malerstein.

Q. What is your occupation?

A. Mattress manufacturer.

Q. With what business are you connected?

A. Spiegel & Malerstein Bedding Company.

Q. Have you ever been connected with Jonas & Sons, the defendants? A. Yes, sir.

Q. When did you terminate that connection?

A. The first part of this year.

Q. I show you a copy of U. S. Patent No. 1,421,274 to H. J. Malerstein for mattress, issued June 27, 1922, and ask you if you are the Malerstein referred to in that patent. A. Yes, sir, I am.

Q. Did you at any time ever give Jonas & Sons, the defendants here, the right to use any invention covered by this patent in their business?

A. No; there wasn't any agreement on that, but I [46] intended—or it was always intended I would be a partner in the business.

Q. Well, did you permit them to use it?

A. On that grounds.

Q. When you were connected with them?

(Testimony of Harry J. Malerstein.)

A. On that grounds.

Q. And are they still using it, if you know?

A. Why, I guess they are.

Q. You haven't informed or notified them they must stop using it, have you? A. Not yet.

Q. And did you permit them to use it at all times while you were connected with it?

A. As I say, on the grounds that I was to be a partner in the business.

Q. But that use was made with your permission?

A. Yes.

Q. Now, when did your connection with defendants start?

A. Oh, I have been connected with the defendants since 1917.

Q. Have you examined Plaintiff's Exhibit No. 3, this mattress? A. Not closely.

Q. Will you please refer to it and make any comparison you can find to exist between the [47] construction of this Exhibit 3 and the construction shown in this patent of yours, No. 1,421,274?

A. Well, this patent shows a mattress having an outside cover consisting of an upper and a lower cover in connection with the boxing that is used on mattresses with the filling inside. It has ordinary filling; it can be cotton, or floss, or any desirable filling. It has loops running on the inside of the ticking both ways for reinforcing, in the lower ticking and in the upper ticking. Now, under each eyelet there is a loop dropped from both those straps running lengthwise and crosswise. This loop is

(Testimony of Harry J. Malerstein.)

formed for the intention to take up the straps on the inside, which it calls for in this here patent. This is exactly how it is before it is pulled down and after it is pulled down.

Q. Do you find any difference between the construction of this mattress, Exhibit 3, or any of the features of it, and what is shown in the Malerstein patent; and if so point them out.

A. Not one. It is all made in accordance with this here idea of the patent.

Q. You find no differences? A. None whatever.

Mr. BLAKESLEE.—We offer in evidence under the stipulation certified copy of the Malerstein patent [48] No. 1,421,270, as Defendants' Exhibit "R."

The COURT.—It may be filed.

Mr. BLAKESLEE.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. Please take the Malerstein patent you have in hand and also look again at this mattress you have just examined. It is my recollection you stated there were no differences between the mattress shown in the patent and this defendants' mattress Exhibit 3. I call your attention to the string or tie marked "18" as shown in Fig. 5 of the patent and call your attention, further, to the fact that that string is not sewed through these loops. Now, will you look at the mattress and tell me if the construction or the connection of the string or tie with those loops is the same as shown in the patent?

(Testimony of Harry J. Malerstein.)

A. Can I rip up a little more here?

Q. Yes, you may rip it up further if you wish.

(Witness ripping mattress, Plaintiffs' Exhibit 3.)

A. Now, I find on this here mattress the ties is hooked to the strap. Instead of going around the loop it is hooked up at the strap.

Q. That is, through the—

A. Through the loop.

[49] Q. In other words, in Plaintiffs' Exhibit No. 3 the tie or string passes through the material forming the loop and not around it as shown in the patent; is that correct? A. Yes.

Mr. GRAHAM.—That is all.

Redirect Examination.

(By Mr. BLAKESLEE.)

Q. Have you any further statement to make as to what you find in this connection?

A. Yes; I can explain something more.

Q. Yes; state what you have to say.

A. In this regard, as far as the twine and the loop over here, this being a new thing in the market, it took us a little time to break in the mattress-makers how to tuft this mattress. Now, after a few weeks making this mattress we found out that at the top of the goods, and at the top of the mattress, where it shows a seam running one way or the other, there is a corner right there where the eyelet sets. If the mattress-maker takes his needle and goes down pointing toward the corner of these two seams, going down toward the bottom straight, and going in at

(Testimony of Harry J. Malerstein.)

the bottom pointing again to the corner and coming up to the top straight, it will go around those loops; you [50] can't go any other way but hook them up in the angle. This (referring to exhibit) may have been made from the very first, I would judge it was, so this was not made as it should be, but it took us some time to perfect it.

Q. Can you state what, if any, difference it makes in the action or effect of the twine or the tab whether you run the twine around the tab or run it through the tab?

A. It doesn't actually make any difference at all. It holds just the same. But my idea was, when I I thought of that patent, that no goods were strong enough to hold any tufts. When you insert twine with a sharp needle in any goods—it may be ducking or any strong goods—it will break through while using it, and my idea was, when I formed those loops, to tie the twine around the angle of the goods running both ways, therefore if you hook up against the angle with any twine or any lace you are pulling against the strength of the goods running both ways, and it is as strong as could be made, to make the mattress last; so therefore I was insisting on making those ties around the loop at the time when I was making the mattress.

Q. What other feature of this mattress, Plaintiffs' Exhibit 3, or of your patent, have you to [51] mention as being beneficial?

A. There is one thing I have in regard to this mattress: it is the only mattress patented yet, as

(Testimony of Harry J. Malerstein.)

far as I know, in our line of business, that has the exact finish size. There are several patents and several mattresses made where there is a take-up in them somehow although they are patented constructions, but there is none that will go to the exact finished size.

Q. Well, is it possible to cut to the exact finished size in making the "Sanotuf" mattress of the plaintiffs?

A. I couldn't tell you exactly about the "Sanotuf," how it is, exactly, or whether it is made to any size; but I would judge that the mattress reinforced like the patent here, both ways, is the only one that could be cut exactly to any size.

Q. Now, that is this Exhibit 3 reinforced both ways? A. Yes, sir.

Q. You mean having those cross strips?

A. It has strips running lengthwise and strips running crosswise.

Q. Do you find any such thing in the "Sanotuf" mattress of the plaintiff?

A. No, sir. His strips are running one way, [52] across the width of the mattress.

Q. And that gives extra strength, does it, in having those cross strips? A. It helps.

Q. And how about preventing stretching?

[53] A. The preventing from stretching comes in there. Every mattress that is cut in the common construction, there is an allowance of from four to six inches in length and width, because after a mattress is pulled down there is an inch of goods

(Testimony of Harry J. Malerstein.)

going into each of those pockets which must be allowed for before the mattress is made; consequently, after using that mattress for several months or something like that—all depending on the quality,—the mattress will stretch the amount of the excess goods after it flattens out. Now, the only way to prevent that stretching is not to put in the goods, and the only way not to put in the goods is if you can find a way how to take up the excess goods in the inside of the tick.

Q. Is there any such taking up of excess goods provided for in the Roberti mattress?

A. All I could see, there is a tab in there that it pulls down from the inside of it.

Q. Will that prevent stretch in every direction?

A. No, it will only prevent stretching in width.

Q. And in yours you prevent stretching in both directions? A. In both directions, yes.

Q. Are there any other features of difference that occur to you at this time?

A. Yes. In reinforcing the strips there is also another idea. Every seven or eight inches, as you will see in that [54] mattress, it represents a mattress by itself. In other words, every square block that is formed in that mattress after it is made represents a little thing by itself, a little individual part. Every part carries its strength in that particular mattress, whether it is small or large size, because it forms an all-around structure of each section, in the center of the mattress and in

(Testimony of Harry J. Malerstein.)

the side of it and all over the mattress, which I haven't found in any other mattress.

Q. Do you find it in the Roberti patent in suit or in the Roberti mattress?

A. No, sir. There it is only enforced one way.

Q. And all of these units taken together work to produce a complete mattress that will not stretch; is that it? A. Yes.

Q. Are there any other differences or features that you find? A. I guess that is all.

Mr. BLAKESLEE.—That is all.

Recross-examination.

(By Mr. GRAHAM.)

Q. Mr. Malerstein, this ticking used to cover mattresses, does that stretch equally in both directions?

A. It all depends on the quality of the goods.

[55] Q. No matter what the quality is, if it was a poor quality, would it stretch the same in width as it would in length?

A. No, sir. There is certain goods used for mattress-making to a large extent called drills. Drills will stretch on the angle; they will not stretch on the width. Sateens will stretch in width and not in the length.

Q. Well, ticking such as is used on these mattresses, does that stretch more in one direction than the other?

A. Well, this sateen will stretch in width more than in length.

(Testimony of Harry J. Malerstein.)

Q. Then on ticking such as used on these mattresses it is not necessary to have strips running lengthwise, is it, if you say it will not stretch in thickness?

A. Well, but this reinforces the mattress. It will stretch in thickness less than it will in width. But the length, you understand, is longer than the width of the mattress, therefore it will stretch a little, and in the end it will stretch by the end as much as in width.

Q. It is in the width, then, that you need the reinforcement, is it not?

A. According to my idea it needs both.

Q. Now, referring to those little strips you have sewed on the inside of the mattress, they are considerably wider than the opening in the eyelets, are they not? A. This here strip on this mattress?

[56] Q. Yes.

A. Well, those strips are not exactly uniform.

Q. How wide are they?

A. They should be three-quarters of an inch wide.

Q. And there are two of them crossing right under an eyelet? A. Yes.

Q. And how large is the opening in the eyelet?

A. Oh, I don't know. About a quarter of an inch I guess it would be.

Mr. GRAHAM.—Well, that shows for itself.

Q. Now, when a filling is put in that tick those straps are pushed right up against the eyelet, are they not? A. Yes.

Q. And then in putting the needle through is it

(Testimony of Harry J. Malerstein.)

not more likely that it will sew right through those strips than otherwise, as shown by your mattress?

A. I didn't hear that.

Q. Is it not more likely that they will sew right through the strips than tend to go around them as you have described?

A. Well, as I have stated, this was sewed to the loops when it should have gone around.

Q. Now, when you go through the top of the mattress, that is, you go through the upper tick and then through the filling, how do you dodge the loops before you pass out [57] of the eyelet in the bottom tick?

A. If you go down straight you will miss it, going from the top. If you point towards the corner of the seams running both ways going down straight you work the tab on the side.

Q. Isn't that pretty much guesswork?

A. No; after working awhile on the bench the mattress maker will know right off whether he strikes that loop or not. If he goes down straight he runs the loop on the side.

Q. Now you have stated that when you go through the upper eyelet you go over at an angle, and it must be a considerable angle, because you are going through, according to your testimony, a quarter-inch hole and you are missing a three-quarter inch strip, therefore your needle would be at a considerable angle. Now after you miss the upper strip and are starting down through the filling how are you

(Testimony of Harry J. Malerstein.)

going to guide the needle to pass through the lower—

A. The strip is three-quarters of an inch; the eyelet is a quarter of an inch wide, and you only have a quarter of an inch to work on the side. It is very simple; it is done.

Q. But you haven't told us how you do it.

A. Well, as I say, if you go down the top you point toward the angle with the needle, that way. If I had a [58] needle I could show you.

Q. Here is a mattress needle (handing same to witness). Now show the Court how you perform that operation.

A. (Demonstrating on Exhibit 3.) Well, this is the hook here. (Demonstrating.)

Q. Now that is much easier because the loops in that are pulled down. I want you to show how the needle goes through.

A. Well, if you have the loops come up you pull it down and kind of go against it. When the loops lay loose under the eyelet you go like this (demonstrating).

Q. Doesn't the filling push the loops up against the tick? A. Yes, but they just lay there.

Q. And you have a sharp-pointed needle?

A. Yes, something like this, but not quite as large.

Q. You can't see the loops at the bottom eyelet; you don't turn the mattress over and look at it, do you?

A. No, but the rack for the mattress is formed out of slats, with six or seven inch spaces between

(Testimony of Harry J. Malerstein.)

the slats. Now they lay out the mattress straight along one slat, with an opening down at the bottom. Now they will see the goods coming right through, and don't have to go on the side of it.

Q. Do they always hit the eyelet?

A. No; they look at it, they feel it. You have to look in the bottom to catch the straps.

[59] Q. But can you see the lower straps when you are working on the eyelets?

A. If they lay flat you don't see it. He will feel the strap through the eyelet, and that will show him the goods, and therefore he knows he has to take it out and go on the other side of it.

Q. As a matter of fact you can't say positively that in making mattresses under the Malerstein patent they do not sew through the straps, can you?

A. Yes.

Q. Is this mattress here one of your mattresses?

A. Yes, that is made by J. H. Jonas & Sons.

Q. You have testified that this mattress was made in accordance with your patent. Is that correct?

A. Just now I said this mattress was made by J. H. Jonas & Sons.

Q. But you have testified this mattress was made in accordance with the Malerstein patent.

A. Yes.

Q. And this shows the ties going through the strips, does it not? A. Yes.

Q. And in your patent the strips are not sewed through by the ties but the ties pass around them; is that correct? A. Yes.

(Testimony of Harry J. Malerstein.)

Mr. GRAHAM.—That is all.

[60] Redirect Examination.

(By Mr. BLAKESLEE.)

Q. You mean us to understand that the cord always went through the tabs, or part of the time, or what have you to say about that? Did they go through the tabs some of the time, or how much of the time?

A. Well, at the beginning, while the mattress makers were not very good at it, it being a new thing to them, some of them would insert it in the tab; but after they had been working toward that end, in order to perfect it,—I just notice, this being one of the first mattresses, you will notice the loop is sewed around over here, while over here it is square.

Q. Well, after your mattress makers got accustomed to making them what was the method?

A. It was going around the loops.

Q. Did you follow the manufacture right along at the defendants' place?

A. Yes, sir; I worked there.

Q. Were you in charge of the manufacture?

A. Yes, sir.

Q. And was that the practice, to put the cord around the tab?

A. Yes, sir. They have been getting fifteen cents extra for tufting by that particular method.

Q. The workmen? [61] A. Yes.

Q. Now do you know from your observation whether the tufting ever breaks in the plaintiffs' mattress? A. The tabs?

(Testimony of Harry J. Malerstein.)

Q. The tabs or any part of the tufting.

A. Yes, sir.

Q. Where does that break occur?

A. The tab breaks loose from the strip.

Q. Have you seen that in mattresses made by the plaintiff? A. I have seen it—

Mr. GRAHAM.—That is objected to as secondary evidence. If anything of that kind occurs he should produce the mattress in court.

The COURT.—He may state if he observed it.

A. Yes, we have noticed several of them in the stores, that have had tabs broken loose off them; that being in the filled mattress.

Q. Have you ever had that occur in making a mattress in accordance with the Malerstein patent, where the cord passed around the tabs?

A. No, sir. Dealers seem to praise the idea of it, that you can put up a dozen or fifteen mattresses one on top of the other, and after you pull out the bottom mattress it will assume the same shape as the top one would.

[62] Mr. GRAHAM.—We move to strike that out as not responsive.

The COURT.—It will be stricken out.

Q. (By Mr. BLAKESLEE.) Have you ever had the tabs break where the cord or twine went around the tabs? A. No, sir.

Q. Did you ever have any occurrence of breakage of that sort?

A. Not that has come to my attention.

Mr. BLAKESLEE.—That is all.

(Testimony of Harry J. Malerstein.)

Recross-examination.

(By Mr. GRAHAM.)

Q. You referred to the workmen getting fifteen cents extra. What did you refer to?

A. For tufting. Just tying this particular mattress.

Q. You don't want us to understand they got fifteen cents extra for missing these strips and not going through them, do you?

A. For tying their tie to go around the loops; yes, sir; because otherwise, for missing the loops, they were not supposed to get anything. They were supposed to take less for that mattress, for the simple reason that in a common construction mattress they have to mark out the spaces where they have to tuft, while here they had eyelets to guide them and they could catch those loops [63] without any interference. But in order to work around those loops and tie them both together they are getting fifteen cents extra to-day. I understand. That was my arrangement with them when I first put them on the bench.

Q. A mattress-maker could take a needle and sew right down through the eyelets of defendants' mattress, could he not? A. Sure.

Q. He wouldn't have to change the position or construction of any parts?

A. It would never be satisfactory.

Mr. GRAHAM.—I didn't ask that, and I move to strike out the answer.

The COURT.—It will be stricken out.

(Testimony of Harry J. Malerstein.)

A. He could do it.

Q. (By Mr. GRAHAM.) And he could do it without any change in the construction; that is, you would have the same eyelets, the strips in the same place, and the filling in the same place, and the mattress maker could simply take the needle and go straight down through the straps and eyelets?

A. He wouldn't catch both strips at all times.

Q. Well, he could sew through the strips, could he not? That is the question.

A. Sometimes yes, and sometimes no.

Mr. GRAHAM.—That is all.

[64] Mr. BLAKESLEE.—That is all.

The COURT.—All witnesses who have been subpoenaed to be here will please return at two o'clock.

(A recess was thereupon taken until two o'clock P. M.)

[65] AFTERNOON SESSION—2 o'clock.

TESTIMONY OF JACOB H. JONAS, FOR DEFENDANTS.

JACOB H. JONAS, defendant herein, called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BLAKESLEE.)

Q. Please state your name.

A. Jacob H. Jonas.

Q. You are one of the defendants in the present case, are you? A. Yes, sir.

(Testimony of Jacob H. Jonas.)

Q. How long have you been in the business of making mattresses and selling them?

A. Since 1907.

Q. All that time in Los Angeles?

A. No; also in San Francisco. In Los Angeles since 1917.

Q. You have been here since 1917?

A. Yes, sir.

Q. The defendant Malerstein is your son-in-law, is he not? A. Yes.

[66] Q. And when did he enter the business with you? A. In 1917.

Q. Did you have it called to your attention when patent was issued to Mr. Malerstein, No. 1,421,274, copy of which is Exhibit "R" in this case? Was it called to your attention when that patent was issued?

A. When that patent was issued; yes, sir.

Q. Did Mr. Malerstein call it to your attention?

A. Mr. Malerstein, when he had a patent, showed it to me and showed me he had a patent for this.

Q. Did you have any discussion at that time regarding this patent and its invention?

A. I had a discussion. I examined it, and I said, "I believe that is the very best mattress I have ever seen in that line made."

Q. Did you commence making mattresses like this patented mattress at that time?

A. Not right off when the patent was issued. It was quite a little while later. I don't know—it must have been several months.

(Testimony of Jacob H. Jonas.)

Q. And was anything said or done regarding your having permission to make such a mattress?

Mr. GRAHAM.—We object to any contractual relations between the party J. H. Jonas and the party Malerstein as entirely immaterial to this case. The fact appears in the case that they are making mattresses, or claim to [67] make mattresses, like the Malerstein patent. Now as regards any contractual relations, or on what terms they were made, it does not affect the issues in this case at all.

Mr. BLAKESLEE.—We simply want to show there was an implied license at least under the theory that they were operating in accordance with the patent to one of the defendants, which, while it may not raise a presumption of noninfringement, still raises a presumption of patentable difference, as counsel has stated, and also raises certain presumptions as to good faith, and it is material for those reasons in an equity case of this sort.

The COURT.—It occurs to me that on the latter ground it might be admissible. The objection is overruled.

Mr. GRAHAM.—Exception.

Mr. BLAKESLEE.—There are decisions point-blank to the effect that where the defendant is operating under another patent it is a presumption of noninfringement; but this Court has never heard me assert that doctrine here, nor will I ever do so, because I agree with Mr. Graham that that

(Testimony of Jacob H. Jonas.)

is not good law. But the fact of a patentable distinction is good law.

(Last question read.)

A. Merely the fact that he had a patent. I considered that, that that was sufficient proof that a mattress [68] like that could be made under the granting of a patent.

Q. Was anything said between you and Mr. Malerstein about your starting in to make such a mattress and his owning a patent on it?

A. Do you mean under what rights?

Q. Yes, anything about such rights.

A. Well, the right to make that patent was considered, and he said, "We will make that mattress here in Southern California and all the royalty that I can get out of it will be out of the company" —what he gets in other places. In Southern California we were supposed to make that mattress.

Q. You and he and your sons? A. Yes.

Q. And you were partners then, including Mr. Malerstein?

A. Well, we were partners anyway.

Q. But he was not a partner in the business?

A. No.

Q. But he permitted you to go on and make these mattresses, did he? A. Yes.

Q. Has he at any time terminated that permission? A. No, he has not. Not as yet.

Q. At no time? A. No.

[69] Q. And at all times he has known of your making those mattresses, has he? A. Yes.

(Testimony of Jacob H. Jonas.)

Q. What have you to say, Mr. Jonas, as to the defendant's mattress like Exhibit 3 in comparison with the mattress put out by plaintiffs and known as the "Sanotuf," from the standpoint of its commercial features and the features of it upon which you sell it?

A. Well, I consider that mattress, from a commercial feature, the best made in this line, much superior to plaintiffs.

Mr. GRAHAM.—I move to strike out the answer as a conclusion.

The COURT.—He may define what he means by giving his reasons.

A. (Continuing.) In the first point of view, what we call a never-stretch mattress, many people were trying very hard to get ideas to construct a mattress which would not spread and streach, including the defendant, who has a mattress that he considers has a never-stretch feature in it. But from my experience I have noticed and I have seen mattresses, the defendants', which, after a while using, they were battened out and they were just as wide as if they had never been constructed with the never-stretch feature, for the simple reason that when they cut their mattress they allow for the ticking just [70] as much if it would be tufted, and the mattress spreads out after a little while using; where with that mattress that we were manufacturing under the Malerstein patent, that mattress, from a practical point, we know that we cut that mattress the exact size before it is made,

(Testimony of Jacob H. Jonas.)

and to correspond to the size when it should be made after it is tufted or pulled down on the side. There is no allowance made whatsoever in any way or shape in the ticking to allow any spreading. The main feature about our mattress, what we manufacture under the Malerstein patent, we consider that superior, is the way the ties inside are made. They are doubled across each other and a string goes around and takes in the bottom and the top ticking, and when it is pulled down it holds firm and can never relax. Now, again, as to plaintiff's mattress, he was making that mattress, to my knowledge, in different ways, experimenting with it, and I didn't see it as yet until it was an accomplished thing. The last one that he makes, with the tabs sewn on to the strips merely by going over once with a sewing machine, it is liable to break off the tab. Now if the tab doesn't break off, by pulling the needle and inserting the needle inside in the mattress and cutting through that pad, you don't know how far you cut that pad, whether it is right near or far away from the edge, consequently by a little handling of the mattress afterwards in the store or at [71] home that cut,—or the twine that cuts through that tab will cut the tab through and break it through. I know for a fact that the plaintiff had to send out in many cases and fix mattresses in various places for various dealers, and they all of them told me so before I ever knew about the Malerstein patent. I neevr considered them a perfect mattress, outside of a little advertising mat-

(Testimony of Jacob H. Jonas.)

ter; but to give the real value to the public it is far from being so. Our mattress, as I have stated before, is made where it eliminates all the defects the plaintiff's mattress has in it from a practical standpoint. Furthermore, when we started to sell that mattress I was insisting on the men to see to live up to it that that mattress should be made exactly as it is described in the patent, because that is the only feature where that mattress is good, and we had hardship in the start with the men not being experienced, and some of them, unfortunately, worked in plaintiffs' place, and they were used to sticking that needle through that tab and they forgot themselves and they were sticking the needle through the strips; consequently, while it was not so easy to break through as in the plaintiffs' mattress, still it wouldn't break out.

[72] Then Mr. Malerstein was foreman or superintendent in that department, and he said to me, "The men cannot make it for that price because they claim it takes them longer to get around and get the ties around the mattress"; and I said, "If that is the question we will have to stand the price —raise the price for that mattress and pay more," which we did. We paid them 15 cents, and it is understood that they have to do that work precisely as described. Now, again, when we were going out to sell that mattress, whenever I came in contact with prospective buyers, the first thing was to convey the idea that that mattress outwardly might look like some similar mattress in the market, but

(Testimony of Jacob H. Jonas.)

it is no comparison, one with the other, and that mattress is so superior. And I showed them the construction and went into details to explain to them; and I said, "Did you ever handle the other mattresses on the market?" Most of them said yes. "How did you find them?" They used to say, "Well, —"

Mr. GRAHAM.—I object to any testimony as to what was said, as hearsay.

The COURT.—Yes, that is hearsay.

Mr. GRAHAM.—And I move to strike out—

The COURT.—You may state what you observed, yourself, but do not state what other people told you. [73] You will have to produce them to testify for themselves.

A. (Continuing.) I observed it myself, that that other mattress will consequently not stand criticism while being used or handled; that, more or less, they are apt to break through the tabs; and, explaining that situation, I showed them the difference in the superiority of that construction of the defendants over any similar mattress in that line, and everyone admitted—

Mr. GRAHAM.—Now, if the Court please, we object to any statement made by anyone else, as hearsay.

The COURT.—Yes, that, again, would be hearsay. Do not say what was said by anyone, unless you were talking to one of the parties to this suit.

Q. (By Mr. BLAKESLEE.) You have seen

(Testimony of Jacob H. Jonas.)

mattresses, have you, put out by the plaintiffs where the tabs were torn? A. Yes, sir.

Mr. GRAHAM.—That is objected to as leading.

The COURT.—Well, that is more or less preliminary. The objection is overruled.

Q. (By Mr. BLAKESLEE.) On how many occasions? A. Many occasions.

Q. Where? A. In different stores.

[74] Q. Did you ever observe whether the mattresses put out by defendants (?) stretched in the tick? A. Yes, sir.

Q. And what did you observe?

A. I observed that the mattresses were sent over to us for remaking, for they were stretched and spread, and I measured those mattresses and they were three or four inches wider as they had them. We have some of them on exhibit at our place yet.

Q. I don't mean the defendants' mattresses; I mean the plaintiffs' mattresses. Do you know of cases where they stretch?

A. I know of occasions where they sent them over to us to be made over, for some people get mattresses back from customers when they are stretched.

Q. You don't mean the defendants' mattress, but the plaintiffs' mattress?

A. The plaintiffs' mattress, yes.

Q. Did you ever have any complaint from the trade of your mattresses ever stretching?

A. I never had any.

Q. At any time have you or have any of your

(Testimony of Jacob H. Jonas.)

salesmen or representatives represented to the trade that the mattreses put out by you were the mattresses of the plaintiffs in this case?

Mr. GRAHAM.—That is calling for hearsay [75] testimony, and we object to it, your Honor.

The COURT.—As far as he knows he can answer.

A. We never did allow anybody to represent our mattress for the defendants' mattress.

Q. (By Mr. BLAKESLEE.) Did it ever occur to your knowledge?

A. It never occurred to my knowledge at all.

Q. To your knowledge did you or did any of your representatives ever represent to the trade or to anyone that the mattresses put out by you were the same as the "Sanotuf" mattress?

A. It would be—

The COURT.—No, just say yes or no.

A. Never did.

Q. (By Mr. BLAKESLEE.) Have you or has the defendant or have the defendants ever put out to the trade or made or sold or issued from your factory any mattress bearing the name or trade-mark "Restmore"?

A. Never did under the firm of J. H. Jonas & Sons.

[76] Q. Under what name have you issued your mattress? What name have you applied to it? A. I applied the name "Tiednotuff."

Q. And how long have you used that name on the mattresses?

A. I used it previously in San Francisco. I

(Testimony of Jacob H. Jonas.)

made a mattress of different construction, but I abandoned it and for a long time didn't make it, and I newly started to use it when Malerstein's patent was granted.

Q. Have you applied for registration of that trademark in the Patent Office? A. Yes, sir.

Q. I show you a model of part of a device resembling a mattress or a framed construction covered with ticking and ask you if you know anything about it? A. Yes, sir.

Q. Please tell us what.

A. Well, that was made to show to prospective buyers the construction of the mattress and what it consists of. That gives them an intelligent idea how and what that mattress inside looks and what makes that mattress—what we claim it to be.

Q. What mattress do you refer to now?

A. To the "Tiednotuff."

[77] Q. To the defendants' mattress?

A. The defendants' mattress, what we are making under the Malerstein patent; and we were trying to convey the idea to prospective buyers, and we furnished them with those sometimes to show their prospective buyers what the mattress is; because most people, when they buy a mattress, think the mattress is only what it looks like; and that is to show the goodness of the mattress, that it has holes, and is ventilated and so forth.

Q. Is this one of a number which you made to give to your trade?

A. Yes; we made about 100 or more I think.

(Testimony of Jacob H. Jonas.)

Q. When did you make that one?

A. We made that one right when we started to manufacture the mattress.

Q. As far as this goes, does it follow the construction set forth in the Malerstein patent?

A. Precisely, to our knowledge.

Q. What have you to say as to the connection of the cord or thread with the tabs in the mattresses you put out? Please state how they have compared with the way the cord or thread is applied to the tabs in this model.

A. In this model we show that the tuft, or string that is supposed to take the place of the tuft [78] in the mattress, goes around on those straps that they are sewing across each other, and the width and the length. In the first place the crosses of those strips reinforce that ticking to that extent that the ticking by itself will not stretch. There is a difference between spreading a mattress and stretching a mattress. A mattress spreads on account of the allowance of tufts in the common mattress where they are pulled down for every pocket created by the tuft, and after using them a while the mattress spreads out. There is also a stretch in the ticking, which is that the ticking itself, the construction of it, will stretch by a little using. Now, those crosses running the width and length of the mattress reinforce the mattress. That ticking by itself is stronger, not to stretch, and also by being flat in the top—that is exactly the size of the mattress cut—an allowance is made inside, in the

(Testimony of Jacob H. Jonas.)

loops, and doesn't allow for spreading, because there isn't any extra material given in that ticking to allow the spreading as in common mattresses. Now, again the strings, or that cord, tying the top to the bottom, as you might observe, has two strips sewn on, fastened on to the tick, and they actually will stand any pressure put upon them, more than it is necessary to hold, being that every section is like a mattress by itself; it [79] holds the filling inside firmly and doesn't let it shift from one place to another, and also makes it even fitting throughout; where in the plaintiffs' mattress the allowance is not made for the tufts. The ticking is actually pulled down flat as it would be in a common constructed mattress. It is not as it represents. The mattress, a little while using, spreads out, and it is wider than it was when it was made on the start; then it doesn't have the effect that it should have or what is claimed for it. Now, he reinforces the mattress, truly, in the width, with that tab, or the strip sewn to the tab, but it doesn't do good for certain kinds of ticks which stretch lengthwise just the same, or crosswise, and therefore it doesn't answer the purpose as good as our mattress that we are making under the Malerstein patent.

Q. Now, how does that model compare with the way you have made your mattress in the way that the cord or twine is connected with tabs?

A. Connected with the strips?

Q. Or with the strips there. Is that the way you made the mattress?

(Testimony of Jacob H. Jonas.)

A. That is just exactly the way we are making the mattress, yes.

Q. Have you at times passed the cord or twine through the tabs?

[80] A. On the start, when we started to manufacture that mattress, due to some people having worked on a similar mattress—or I believe it was the defendants' mattress—being used to put that needle through their tabs, they thought we wanted them to do likewise, and they made, in the start, some mattresses not paying attention to the real construction as we should want him to make, and when we noticed that, when we knew that that would not stand up, or it might also break, too, sometimes, then we instructed the men—and we also paid them more for it—to make that mattress exactly like that sample you have in your hands.

Q. Now, in sewing those tabs or passing the cords through the mattress to connect these tabs you use a very long needle, do you? A. Yes, sir.

Q. And using a long needle like that, is it easy or difficult for the workman to pass the needle through at one side of the tab rather than passing it through the tab?

A. That eyelet, standing where it is, is about in the middle of the tabs, and the mattress maker has to insert the needle and he can feel when he gets through that cloth and he has to work away—if that strap would be in his way he works it away with the needle, or with the regulator as they call it, just to go [81] around it, and when he gets to the

(Testimony of Jacob H. Jonas.)

bottom he just works his way through in the same way, to eliminate that strap and go around by it to make the tie.

Mr. BLAKESLEE.—We offer in evidence this specimen of mattress model sent out to the trade as testified to by the witness, as Defendants' Exhibit "S."

Mr. GRAHAM.—If that is offered for the purpose of showing the construction of defendants' mattress, we object to it as not the best evidence. It is merely a model that has apparently been made specially for a definite purpose.

The COURT.—For the purpose of illustration; and comparison with the patent will show whether it is accurate or not.

Mr. BLAKESLEE.—Yes, and also being a specimen of models sent to the trade on which they actually do business, on this whole question of infringement and unfair competition; bearing also, as part of the exhibit, the label "Tiednotuff."

The COURT.—It will be received.

Mr. BLAKESLEE.—Counsel may inquire.

Cross-examination.

(By Mr. GRAHAM.)

Q. Did you have any agreement with Mr. Malerstein about the manufacture of this mattress?

A. We had a verbal agreement.

[82] Q. Did you have an agreement with him that he was to be taken into the firm or to share in the profits?

A. No, we didn't have any agreement of that

(Testimony of Jacob H. Jonas.)

kind. The only agreement was when they started to sue, or the plaintiff, when first I was notified that he was in litigation, I was supposed to furnish the cost and expense to carry that through court to show the legality of making that mattress, and for that purpose we will be allowed to make that mattress in Southern California without expense.

Q. You have spoken of seeing some experimental mattresses, so-called by you, made by the plaintiffs?

A. Yes, sir.

Q. When did you see those?

A. I saw them in 1916, and then I saw them again in some later years. The reason why I remember 1916, that was the year before I left San Francisco. And then again when we were here in business in Los Angeles in 1917 and started in I have seen several different specimens of mattresses entirely different made as any one of the exhibits or the claims in that patent.

Q. Well, they make a great number of mattresses, do they not, to your knowledge?

A. I am speaking about that "Sanotuf" mattress. [83] The "Sanotuf" mattress was made in a different manner as exhibited here.

Q. Did you see any of these mattresses that you have just referred to in San Francisco?

A. I have seen them in San Francisco; I have seen a model of it only, shown by a representative, a fellow by the name of New.

Q. When did you leave San Francisco?

(Testimony of Jacob H. Jonas.)

A. In the latter part of 1916; about December I think.

Q. How long before you left there did you see this model?

A. I don't remember, but I have seen it prior to that.

Q. How long prior to that did you see it?

A. I don't remember if I have seen it prior to that.

Q. Did you see it a year or two years or three years prior? A. Prior to 1916?

Q. Yes. A. I did not.

Q. When did you see it?

A. I saw it just about when I sold my business in the Consolidated Mattress Company, and there was a traveling salesman for the firm of New & Frank I think [84] it was—but I knew that man New, who was from Chicago, and he had a sample of a mattress and said it was made by Roberti Brothers, and he showed it to us and he said—I think his intention was to get us interested to make that mattress on a royalty. I told him that I didn't think much about that mattress, that it doesn't seem to stand up to any criticism, or that it had any merits worth while.

Q. Well, at any time that you saw that mattress some time in 1916, you knew that before that, did you?

A. I never heard about it before, no.

Q. Then what do you mean by saying it didn't stand up under criticism at that time?

(Testimony of Jacob H. Jonas.)

A. From the sample that he showed us I said "A mattress like this will not stand up, and it is not worth while to make it."

Q. Then it was just your opinion?

A. That was my opinion.

Q. It was not formed by the expression of anyone else, but yourself?

A. I myself and my ex-partner—at that time we were partners—of course we are partners here now too.

Q. Describe how that sample was made?

A. That first sample what I have seen had no eyelet. It was a pad sewn back of the ticking, no [85] strip whatever, and merely pulled through the top of the mattress and through the ticking, and after you insert that needle through that ticking, consequently that litle hole that needle would make they said we could strike out or rub it up with the point of a needle and it will never be shown. He also stated at that time that they are trying to make eyelets but they didn't have the machine or the manner or the way how to make it; but they said they were expecting pretty soon to put in eyelets, and that it would be much better. That was the first one I saw.

Q. Now, with respect to the old, common form of mattress, did they have any trouble with the ties?

A. With the ties in the old mattresses there is no trouble, so to say. The majority or the greatest majority of them will always stand up as far as the ties are concerned. The tufts fall out. That

(Testimony of Jacob H. Jonas.)

seems to be the trouble with the old construction mattress.

Q. Did the ties ever become untied or break?

A. Very seldom. The ties don't break, more or less, in a mattress. Very seldom they will.

Q. Now, you have testified regarding the carrying away of the tab in plaintiffs' mattress. Do you mean that the tab became torn at the part where it is sewed fast to the strip? A. Yes, sir.

[86] Q. Now, with that construction of mattress, the stitches run across the direction of pull, don't they? A. I can't understand that.

Q. I say, the row of stitching that fastens the tab to the strip runs across the pull on the tab, does it not?

A. The tab is sewn on to that strip, yes.

Q. And the row of stitching runs across, and the pull it against the whole row of stitching, is it not?

A. Well, the tab is only about, to my knowledge, whatever I have seen of them, about an inch or an inch and a half wide, and there isn't enough stitches or sewing in that little tab to stand the pull.

Q. Now, in your mattress the pull of the tie is against the end of a single row of stitching, is it not?

A. Against the end of a single row of stitches?

Q. Yes. A. What do you mean by that?

Q. Look at this mattress, one of your own mattresses here, Exhibit 3. (Counsel and witness examining mattress.) The row of stitches runs toward the eyelet. A. Yes.

(Testimony of Jacob H. Jonas.)

Q. And the pull on the strip is against the end of a single row of stitches on that, is it not?

[87] A. Yes, but the difference is that that strip or tab is sewn on the whole face of it. You would have to pull that whole ticking—there are many thousands of stitches on the length of it to hold it.

Q. Yes, but you are pulling against one single stitch at a time, are you not?

A. The proof of it—you can try—

Q. I am asking you to say whether or not the pull is against a single stitch at a time.

A. Is sewn on the whole face of it, one single stitch, yes.

Q. Now, will you look at the plaintiffs' mattress? (Counsel and witness examining Plaintiffs' Exhibit 4.) I call your attention to the way the tab is fastened to the strip. Now, the pull on that is against a row of stitches extending all the way across the tab, is it not?

A. Yes, sir, across the tab.

Q. And with that knowledge would you say that the tab will pull off as easily as the strips will become loosened and sag down on defendants' mattress?

A. It stands to reason, from a practical standpoint, that that tab is only a narrow little piece of material sewn on, where there is only a limited amount of stitching holding it, and that will surely more easily break off than strips sewn on the whole face of [88] the mattress, where you would have

(Testimony of Jacob H. Jonas.)

to tear the whole mattress off, with so many of those stitches, before you can loosen it.

Q. I am not asking about pulling the whole mattress off, but if those stitches will not become loosened and permit the part of the strip to which the tie is fastened to sag down.

A. From a mechanical point I would say that they will not loosen as easy as the other.

Q. And you will say that in view of that there is a pull against a single stitch in defendants' mattress as against a pull against the whole line of stitches in plaintiffs' mattress?

Mr. BLAKESLEE.—That is argumentative and speculative. The question is whether they do give way.

The COURT.—Of course he is asking which will give way more readily, one or the other. What do you think about that?

A. The fact that defendants' mattress, that strip, by itself, sewn by one single seam, never gives way, but the tab, goes to show that one single seam holds better than that tab. If our mattress is sewn on the strip or the face—I have never noticed one of the defendants' mattresses where the strip sewn with a single seam will give way, but the tab does give.

[89] Q. (By Mr. GRAHAM.) Now, in regard to the stretching of the mattress, you have testified that defendants' mattress will not stretch. Is that correct? A. Yes.

Q. I call your attention to defendants' mattress,

(Testimony of Jacob H. Jonas.)

which is Plaintiffs' Exhibit No. 3, and ask you if this material from which the strips are made is not the same material as the ticking. A. Yes, sir.

Q. I also call your attention to the fact that that strip is secured to the ticking by a single row of stitching. Is that correct? A. Correct.

Q. And that the strip is entirely loose except where it is connected by that row of stitching.

[90] A. That is loose for that purpose, to create that loop on double crossing.

Q. I am referring to this long strip between the loops.

A. Yes. The long strip between the loops is sewn down tight to the ticking, yes.

Q. Now, as a matter of fact, isn't that loose (showing)?

A. Do you mean the—well, the seam couldn't hold the whole strip; the seam goes on in the middle. But you couldn't tear it off.

Q. The seam is loose on both exhibits, is it not?

A. Yes.

Q. And that material, being the same material, will stretch the same as the ticking, will it not?

A. But that strip is double and sewn before. We sewed those strips before, on the machine, and we are supposed to turn them over twice or three times, and sometimes more than that, and sew it on the machine. We make those strips before. Then after that we take that strip and sew it to the ticking. Now when that same strip is folded over twice or three times and sewn one seam through, that creates it

(Testimony of Jacob H. Jonas.)

one strong piece of material that you can hardly tear. You can take off a piece and try to tear it and you will find how strong it is.

Q. The strip is not sewed fast all the way across from one side of the tick to the other, is it?

[91] A. Yes, sir, from one end to the other.

Q. I call your attention here to where these loops are formed.

A. Outside of the loops, where it is purposely to create that loop. It couldn't be otherwise.

Q. And at those parts where it is not sewed fast, in other words, where the loops are formed, there might be some stretch there, might there not?

A. On that little part, that half inch, where the ticking is loose, that ticking will stretch, but that will be insignificant from a practical point. That surface where that part is now sewn on to it doesn't come out to one ten-thousandth of the surface of the mattress.

Q. You have just said it compared as one ten-thousandth of the mattress, How long across it that mattress?

A. That mattress, across, is fifty-four inches.

Q. And how much space do you leave unsewed for each tie? A. About half an inch.

Q. And how many ties are there across the mattress? A. Six, on a full size mattress.

Q. Then you have three inches in fifty-four inches that can stretch; isn't that correct; instead of one ten-thousandth?

(Testimony of Jacob H. Jonas.)

A. I meant to say on the surface of the ticking, which I did say. The stretchable surface of the ticking. You don't refer that to the whole width. Taking it per inch, and how many square inches you have in the ticking, and I [92] might not be far off.

Q. This tying operation of tying the defendants' mattress is quite difficult, is it not?

A. Yes, sir.

Q. And adds expense to the making of the mattress? A. Yes, sir.

Mr. GRAHAM.—That is all.

Redirect Examination.

(By Mr. BLAKESLEE.)

Q. In defendants' mattress where these loops occur the stitching goes right on across the ticking, does it not? A. Yes.

Q. And does that tend to prevent a stretch there?

A. Well, it doesn't do any material good, that sewing.

Q. Then you have other stitching that goes crosswise of the tabs too, have you not? A. Yes, sir.

Q. And then the pulling of your goods on the tabs is resisted—

A. On the strips, you mean?

Q. Yes, on the strips, is resisted by the stitching going two ways, is it not? A. Yes.

Q. How firmly does that anchor the strips; does that anchor them firmly against breaking loose?

[93] A. By sewing up to the surface of the tick-

(Testimony of Jacob H. Jonas.)

ing, crosswise and longwise, they are, to my knowledge, indestructible.

Q. Do they ever break loose there?

A. I never have seen any one. We tested it before we put it on the market, and pulled it, put on more weight in pulling, where necessary, than any pulling of any description through any periods or length of duration of the mattress, and it never let go. You can readily tear the ticking apart before you would pull that strip off.

Mr. BLAKESLEE.—That is all.

Mr. GRAHAM.—That is all.

TESTIMONY OF JOSEPH F. AVRILL, FOR DEFENDANTS.

[94] JOSEPH F. AVRILL, called as a witness on behalf of the defendants having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Please state your name?

A. Joseph F. Avrill.

Q. What is your occupation?

A. Mattress-maker.

Q. Were you ever associated with the Imperial Cotton Works? A. Yes.

Q. Where?

A. I first went with them in about 1911.

Q. Where? A. In Los Angeles.

Q. Whereabouts in Los Angeles?

(Testimony of Joseph F. Avrill.)

A. About 1316 San Julian. About that number.

Q. What did you do there?

A. I was superintendent of mattresses and comforts.

Q. Do you know Edward W. Fox?

A. I do.

Q. Did he have any connection with the Imperial Cotton Works?

A. He was the general manager and secretary of the company.

[95] Q. Is he present in the room? A. Yes.

Q. How long did you remain on location at San Julian Street with the Imperial Cotton Works?

A. We were there until about the latter part of 1912. I guess it was along about October. We moved to a new building that was built for us at Sixteenth and Tennessee—now Sixteenth and Hooper.

Q. I show you here a paper and ask if that is your signature? A. Yes.

Mr. BROWN.—Note that the witness is referring to certified copy of the patent, being Exhibit "B."

Q. I also show you a second paper, Defendant's Exhibit "C," and ask you if that is your signature?

A. Yes.

Q. Do you know to what said exhibits just referred to, and which you have identified as your signatures, refer?

A. Why, to a tuftless mattress similar to these that have been under discussion.

Q. Did you ever manufacture any mattress in

(Testimony of Joseph F. Avrill.)

accordance with either of these applications for patent?

A. The first one that I made was about 1914—in the latter part of 1914—I should say about October.

Q. I show you the application. Is that the application [96] that you refer to, being Exhibit "B"?

A. Well, this is an improvement on the one I had at that time.

Q. I show you Defendants' Exhibit "C" and ask you if that is the structure you manufactured?

A. Mine had the eyelets and a long strip running lengthwise of the mattress with hook-shaped—that is, there was enough slack left in the strip, doubled under, in order to make a loop to engage as you pass through the eyelet.

Q. Well, under which application for patent did you manufacture a mattress?

A. This is the one we manufactured in San Diego.

Mr. BROWN.—Referring to Exhibit "B."

A. (Continuing.) That had a tab fastened on one side. It was a continuous loop sewed at one edge to the upper cover, with the eyelet passing through the upper cover and the tab, leaving a loop about three-quarters of an inch underneath the eyelet.

Q. Now please describe just how you manufactured your mattress that was made at the Imperial Cotton Works.

A. Well, this was made with long strips fastened to the ticking with eyelets. The strips would start

(Testimony of Joseph F. Avrill.)

from the end of the mattress and run approximately about eight inches. There were eyelets passed through the strip—it was doubled back in the direction that it started from. The eyelet passes through two thicknesses of this strip, and there was [97] a slacking of about half or three quarters of an inch left there, and then it continued on to the next tuft, or about seven or eight inches, and the same operation again, attached to the top of the tick and doubled under and connected with two thicknesses of strips to the top loop and around again, and so on for I think ten tufts in the length and seven in the width—that is, seven strips running parallel to each other the full length of the mattress. These were connected with a needle passing through the eyelet and down through this loop and on through to the next loop, out, and back through the eyelet and up through this loop, through this filling and out to the starting point. They were tied, and the knot slipped down through the eyelet, making it hinding the knot and showing no tuft, only showing a slight depression in the mattress, holding the stock firmly between them.

Q. Now, when were such mattresses manufactured, in what year?

A. We made one in 1914, about October.

Q. How do you fix that time?

A. Well, it was during the strenuous times and everybody was looking for business. There was a never-stretch mattress on the market at that time by another firm here, and we were all out for the

(Testimony of Joseph F. Avrill.)

business that we could get, and Mr. Fox suggested that we also go into the field and try to get something, and I conceived this as a very good [98] mattress, non-stretch, to compete with this other mattress that was on the market at the time.

Q. How many of such mattresses did you manufacture? A. I only made the one.

Q. And what did you do with it?

A. We had that in the display rack in the showroom at the factory at Sixteenth and Tennessee.

Q. To what extent was it seen?

A. It was viewed by a good many; in fact, everybody that came in there—Mr. Fox was highly elated with the idea and was very proud of it, and he showed it to everybody, a good deal against my wishes, because it was not protected. I asked him several times to protect it, and I don't know why he failed to do it, but he didn't. He also showed it to one of our competitors, and Mr. Ed Roberti used to come over quite frequently and I have seen him myself examine the mattress very closely as I would pass in and out of the office, and I have heard Mr. Fox explaining the good features of the mattress; that is, just as they were passing in and out he would tell them the good points.

Q. You heard Mr. Fox explain this mattress that was on the show-rack at the Imperial Cotton Works to Mr. Edward Roberti? A. Yes.

Q. And who was present?

A. Well, Mr. Roberti and Mr. Fox; and passing

(Testimony of Joseph F. Avrill.)

in [99] and out probably to get an order and deliver a bill or something of that kind.

Q. Do you have any recollection or do you know whether Mr. Edward Roberti saw this mattress more than once?

A. Well, during the course of two weeks he was over there, I should judge, about five times, in a few weeks time.

Q. Did you have any conversation with Mr. Fox as to why he explained it to Mr. Roberti?

A. I told him that he shouldn't explain it to anyone until we had it protected. He said he didn't think anyone would interfere with it in any way.

Q. Now just when did this conversation referred to take place, with Roberti?

A. Well, I couldn't state that. It probably was in November or December of the same year, 1914.

Q. How long were you with the Imperial Cotton Works at this new location?

A. I think it was on the 11th of February, 1915, that they went into the hands of a receiver in bankruptcy. About that. I think it was the 11th of February, 1915.

Q. Then what did you do?

A. I was left in charge of the machinery by Mr. Sam Fox, who was also interested in the Imperial Cotton Works. They had moved the stock of materials to another building and left the machinery there, and he left me there as a kind of watchman to look after it for two weeks. [100] After that—oh, probably six or eight months—or I think it was

(Testimony of Joseph F. Avrill.)

a year—nearly a year—I went to San Diego. There I worked for the Garrettson Manufacturing Company.

Q. Did you manufacture any mattresses in accordance with your invention?

A. We made a mattress according to this exhibit here.

Mr. BROWN.—Referring to Defendants' Exhibit "B."

Q. Now, please state the difference, if any, that existed between the mattress shown in the drawing Defendants' Exhibit "B" and the model of the mattress exhibited on the show-rack at the Imperial Cotton Works at Los Angeles and which Mr. Edward Roberti saw.

A. Well, this mattress had a separate piece of ticking—if I remember right it was about 7 ½ inches long—doubled over, and one end of it was fastened to the upper cover with an eyelet, and where it was doubled over two open ends were sewed to the upper tick about a half inch away from the eyelets, leaving a loop underneath of about half to three-quarters of an inch deep. The needle was passed through that loop the same as the other and down and back up again and tied and the knot slipped insde.

Q. Now according to Defendants' Exhibit "C" did you manufacture any model or full size mattress or sell any mattresses in accordance with the drawings shown in said exhibit?

A. Yes, we manufactured quite a few. In fact I made [101] some and had them taken to my

(Testimony of Joseph F. Avrill.)

own house and used as an experiment to try; and we found that the eyelets wouldn't hold, that they would pull through the upper cover, and we abandoned that and took up this other. We made several and sold them.

Q. Now, when did you make them, and where?

A. During 1916, in San Diego, for the Garrettson Manufacturing Company.

Q. How many mattresses did you manufacture in accordance with your invention to which you have testified and in accordance with Exhibit "B" while with the Garrettson Manufacturing Company?

A. Well, I couldn't state. I should think, though, about 150.

Q. That was in accordance with Exhibit "B" or Exhibit "C"? A. Exhibit "B."

Q. Did you sell them?

A. They were sold by the Garrettson Manufacturing Company.

Q. Do you know where the mattress is located that was formerly on the show-rack of the Imperial Cotton Works? A. I do not.

Q. Have you made any attempt to locate the same?

A. No, I don't think I could locate it. I haven't tried.

Q. Would you know where to look if you tried to locate it?

A. Well, the only place I could see, the Board of [102] Trade had charge of the sale, and they

(Testimony of Joseph F. Avrill.)

had the sale at Twelfth and San Julian; but I was not there at the sale and don't know who bought it.

Q. How far distant, if you know, was the factory of Roberti Brothers from the Imperial Cotton Works after you moved to the second place?

A. Well, it would be about two blocks and a half.

Q. Do you know Mr. Edward Roberti or Mr. August Roberti? A. I do.

Q. Are they present? A. Yes.

Q. Were you ever in their factory? A. Yes.

Q. When?

A. Well, I worked for them in the early part—I should say about the middle—of 1910. Perhaps it was in September, 1910.

Q. And when did you leave their employ?

A. Well, I left them and went to work for Mr. Fox, afterwards being with Mr. Fox a month, or a few months, I couldn't say exactly.

Q. Do you know a Mr. Joe Scanlon?

A. Yes; John Scanlon.

Q. Did you ever have any conversation with Mr. Scanlon in regard to your mattress?

A. Yes. During the time that I was appointed as [103] watchman over that machinery in 1915 I ran across some eyelets which were left there and I took a sample to Roberti Brothers to see if they would buy them, but they said they couldn't use them; and in going in there I happened to see a mattress come down the chute from the finishing department and I was looking at it and it looked familiar, and just then Mr. Scanlon came down

(Testimony of Joseph F. Avrill.)

and we both smiled. He says, "We are getting it." I says, "I see you are."

Mr. GRAHAM.—I move to strike out that portion of the witness' answer referring to anything said by Mr. Scanlon, as hearsay.

Q. (By the COURT.) Do you know what Mr. Scanlon's connection with the place was?

A. He was at that time foreman of Roberti Brothers.

The COURT.—The motion is denied.

Q. (By Mr. BROWN.) Now, I will ask you to compare the mattress structure that you manufactured while with the Imperial Cotton Works, and which was on the show-rack, with Plaintiffs' Exhibit No. 4, being the mattress now manufactured and represented to be a "Sanotuf" mattress, and explain where, if any, differences exist.

A. (Examining Exhibit 4.) Well, my strip was fastened through the eyelet alone, while this is sewn down with stitching.

Q. You mean the cross-strip?

A. The cross-strip was fastened only with an eyelet to [104] the ticking, while this is sewn down.

Q. In what other particulars was there a difference?

A. Well, that is practically all I can see, only I would call this an improvement over mine in the way of its being sewed.

Q. Then the only difference between your mat-

(Testimony of Joseph F. Avrill.)

tress and the Roberti mattress as shown here resides in the sewing?

A. Well, they have this extra tab, while I used this long strip instead, using it in a hook shape and catching it in a double loop.

Q. Similar to the showing of Exhibit "B"?

A. Yes.

Q. And how did you secure these strips on the interior of the mattress? A. On Exhibit "B"?

Q. No, on the mattress you made at the Imperial Cotton Works.

A. They were fastened with the eyelets (indicating).

Q. I don't mean that. On the inside.

A. They were tied with twine down through to the loop that was left there, passed down through the further one and back up again and tied with a knot and slipped through.

Q. In other words, it would be the same construction, practically, with the exception of the stitching? A. Yes.

Q. Were you ever involved in any interference proceedings [105] in the United States Patent Office with Edward Roberti and August Roberti?

A. Not that I know of.

Q. I show you Defendants' Exhibit "E" and ask you to examine same and if you know anything concerning the same.

A. That is what they would call Garrettson trying to show authority to the former patent.

(Testimony of Joseph F. Avrill.)

Q. Do you wish to correct your former statement, then, that—

A. I didn't understand what— This is correct, but I thought you meant whether I had been, plainly speaking, sued.

Q. No, an interference proceeding. I asked you whether either one of your applications for patent was ever involved in an interference proceeding.

A. Either one of what patents?

Q. Whether either Exhibit "B" or Exhibit "C" was ever in interference with any application of Edward Roberti or August Roberti—any interference proceeding in the United States Patent Office to determine priority of invention.

A. Well, I don't quite understand that.

Q. Have you ever had any conflict with any other application for patent in the United States Patent Office when you filed your application for patent?

A. Maybe I could explain myself by telling you that I explained these matters to the Garrettson Manufacturing [106] Company and they got a lawyer and a patent attorney to dig into the records at Washington, the Patent Office, and prove that I had manufactured this mattress previously. That is as far as I can explain it.

Q. Did you know that Edward Roberti and August Roberti had obtained a patent on a mattress? A. Yes.

Q. Have you ever received any patent for a mat-

(Testimony of Joseph F. Avrill.)

tress in accordance with Exhibits "B" and "C," or were those applications abandoned?

A. This one was abandoned. They were both abandoned on account of the firm going out of the business along about the time they were issued. That is, there was one patent that came to the office some time in May, I think, and they didn't think they would spend any more money on it, and there was a final fee of $25, because they figured on going out of business anyway.

Q. Were you paying for your applications?

A. No, the Garrettson Manufacturing Company.

Q. And they were abandoned with your consent?

A. Yes.

Q. At your direction?

A. Well, I had no means of carrying it on myself, and I just abandoned the whole thing as it was.

Q. After you left the Garrettson Manufacturing Company what did you do?

[107] A. Well, I came to Los Angeles.

Q. And with whom did you associate?

A. Well, I was in quite a number of different things. I drove a bread wagon, for one thing.

Q. Did you ever manufacture a mattress in accordance with your invention or in accordance with Exhibits "B" and "C" after leaving the Garrettson Manufacturing Company?

A. No, I never have.

Q. Why not?

A. Well, I was for three years in the Southern

(Testimony of Joseph F. Avrill.)

California Iron & Steel Company as night troubleman.

Mr. BROWN.—That is all.

Mr. GRAHAM.—If the Court please, we would like to call Mr. Wider and excuse this witness temporarily.

The COURT.—Very well.

(Witnesses Wider and Max Jonas examined at this point; their testimony appearing following that of the present witness.)

Cross-examination.

(By Mr. GRAHAM.)

Q. Mr. Avrill, I call your attention to Defendants' Exhibit "B," the mattress shown in the drawing, and ask you how long prior to the time you signed application papers did you make one of those mattresses (handing exhibit to witness).

[108] (Witness examining Exhibit "B.")

Q. Without referring to the dates on there, but from your independent recollection.

[109] A. I made the mattress first, before I ever applied for patent.

Q. How long prior to the time that you signed your application papers did you make the mattress?

A. Well, when was this (examining Exhibit "B")—

Q. I am asking you for your recollection.

A. Well, I don't know when this paper was issued.

(Testimony of Joseph F. Avrill.)

Q. You remember signing the application for patent, don't you? A. Some time during 1916.

Q. Well, when did you first make one of those mattresses?

A. The first time I ever made one anything like it was about 1914, about the latter part of 1914.

Q. You say you "made one anything like it."

How near like it was the mattress you made in 1914?

A. Well, I should say it would be practically like this (referring to Exhibit "B").

Q. Well, what were the differences?

A. I can't see any difference.

Q. Then are you willing to swear that the mattress you made in 1914 was identical with that shown in that drawing?

A. Well, I am not thoroughly versed in blueprints and drawings. I don't understand these dotted lines. [110] What do they mean? Whether they mean stitching or sewing or what they mean.

Q. Well, then, as a matter of fact you are not able to say that the mattress you made in 1914 is not like that shown in that drawing; is that correct?

A. I am able to say that I made one with strips running the length of the mattress and being tied with eyelets, leaving a loop. This loop was connected from both sides with the twine being run through the eyelets with a needle.

Q. Now when did you make that in 1914?

A. I think it was in October.

Q. How do you fix that date?

(Testimony of Joseph F. Avrill.)

A. Well, business was bad at that time of the year.

Q. But you are quite positive it was in October?

A. Well, I—I think it was in October.

Q. Then you don't know whether it was in October or not; is that correct?

A. It was in the latter part of the year. It was chilly mornings and chilly evenings.

Q. Back in 1914? A. Yes.

Q. You are willing to say that because it was chilly in the morning and chilly in the evenings that you made that mattress in the latter part of the year [111] 1914?

A. No, not exactly on that.

Q. Then how do you fix the date?

A. Well, if I go forward to about the 11th of February, 1915, I can figure back.

Q. All right; now take the 11th of February, 1915. What occurred at that time?

A. The Imperial Cotton Works went in the hands of the Board of Trade.

Q. Now figure back. What was the next event prior to that by which you can fix any date?

A. Well, Christmas.

Q. What happened at Christmas time?

A. I got a necktie from the firm.

Q. From the firm you worked for? A. Yes.

Q. What connection did that have with making the mattress?

A. Well, he showed appreciation for what I tried to do.

(Testimony of Joseph F. Avrill.)

Q. For making a mattress he gave you a necktie?

A. No, not for making the mattress, but he showed his appreciation at that time of the year for what I had done during the year.

Q. Now how does that refresh your recollection as to the date you made the mattress? Was it prior [112] to that?

A. Well, we were generally busier in the fall than any other time of the year.

Q. In your direct testimony you said you made the mattress some time in October. A. Yes.

Q. Now how do you fix that date?

A. Well, as a rule we were very busy in the fall, and this being a bad year we were not quite so busy.

Q. Then you were so busy in the fall and not in the winter? A. In the fall, about October.

Q. You are quite positive it was about October?

A. About October.

Q. Do you recall ever making a sworn statement and sending that statement to the Patent Office regarding the manufacture of this mattress in Exhibit "B"? A. Yes, sir.

Q. Were the statements that you made under oath at that time true and correct?

A. As far as I know.

Mr. BROWN.—Referring to the preliminary statement.

Q. Is that a reproduction of your signature [113] (exhibiting paper)? A. Yes.

(Testimony of Joseph F. Avrill.)

The REPORTER.—What document is that, Mr. Graham?

Mr. GRAHAM.—Exhibit "F," I believe.

Q. (By Mr. GRAHAM.) Now when did you first think of making this mattress?

A. Some time during 1914.

Q. Well, when during 1914? It is very important to fix these dates, and I want your best recollection.

A. Well, I couldn't place it any closer than October. It was about that time.

Q. You think it was in October? A. Yes.

Q. In this preliminary statement, this sworn statement of yours that I have referred to, Exhibit "E," I find the following statement: "That he (meaning yourself) conceived the invention set forth in the declaration of interference on or about the 5th day of December, 1914; that on or about the same date he started making a complete mattress of the said invention and finished it a few days later; that on or about the 15th day of December, 1914, that after it was finished, he placed it in the showroom of the Imperial Cotton Works in the City of Los Angeles." Now, which statement is correct—this statement that you have made in this preliminary statement sworn to by you on [114] the 23d of February, 1917, or your statement that you have made on the stand to-day?

A. Well, I think the October date is, as nearly as I can recollect, the correct date.

Q. I call your attention again to the fact that

(Testimony of Joseph F. Avrill.)

this sworn statement of yours in the Patent Office was made on the 23d day of February, 1917. This is 1924. A. 1917?

Q. Now bearing that in mind do you think your recollection is better to-day than it was in 1917?

A. It is just as good.

Q. Then which one of these statements is correct?

A. Well, I couldn't prove the October date, because I have no proofs. This thing can be proven by my signature only.

Q. How can you prove this?

A. Well, my signature is there.

Q. Simply because it is your signature? You have no way of fixing the date except that you have signed a statement in 1917 to that effect?

A. That is all.

Q. Was that first mattress that you made a complete mattress? A. Yes.

Q. And that was the mattress that went to the Imperial Cotton Works? [115] A. Yes.

Q. Now, calling your attention to Defendants' Exhibit "C," when did you first make a mattress like that shown in Defendants' Exhibit "C"?

A. (Examining exhibit.) That was made about the same time, prior to the one—or about the same time as the one in Exhibit "B." I think that is the one.

Q. Isn't that the one you made at the Garrison Manufacturing Company's plant?

A. Exhibit "C" was made first.

Q. Where was that made?

(Testimony of Joseph F. Avrill.)

A. At the Garrison Manufacturing Company at San Diego.

Q. You didn't go to the Garrison Manufacturing Company until 1916, did you? I am asking you to testify from your recollection.

A. I went there in 1916, yes.

Q. You made that mattress first in 1916. Then you didn't make any mattress prior to 1916; is that correct?

A. I made the other one in the Imperial Cotton Works in 1914.

Q. Then you made that shown in Exhibit "B" first; is that correct?

A. There is no exhibit on the first one, only this interference here (witness handling papers). [116] That shows it here. This is the one I have reference to that I made first (handling documents).

Q. Well, that has no picture on it at all, has it, the one in interference? I am referring to these marked Exhibit "C."

A. That was made in San Diego in 1916.

Q. Well, which one was made in 1914—Exhibit "B"?

A. The one explained in this interference, with the long strips.

Q. That is the same as that marked Exhibit "B," is it not?

A. No. These were short strips sewed and fastened with eyelets; the other was one continuous strip fastened only with eyelets.

Mr. GRAHAM.—If the Court please, there are

(Testimony of Joseph F. Avrill.)

a lot of those exhibits put in evidence here at the same time, and it is almost impossible to examine the witness fully with reference to them at this time. I have a certified copy of this application which is not like the certified copy that was put in evidence, although they both bear the same numbers.

Mr. BROWN.—The one we put in is a photographic copy.

Q. (By Mr. GRAHAM.) Now this document marked Exhibit "B," you have testified that that is not the one that was in interference or with which you made the [117] sworn statement; is that correct? A. Which?

Q. This document marked Exhibit "B," you say that is not the one to which your sworn statement referred? A. That is similar to it, yes.

Q. Isn't that the one?

A. If that has the long strip running parallel.

Q. Now, Exhibit "E" is the sworn statement I have referred to, and I call your attention to the fact that it is marked Interference No. 41,009. Referring to Exhibit "B," I call your attention to the reference to the interference as bearing the same number—41,009. Now do you still say that this sworn statement does not refer to that application (handing papers to the witness)?

Mr. BROWN.—We object to that on the ground that it calls for secondary evidence. The best evidence consists of the written documents, particularly after this lapse of time.

(Testimony of Joseph F. Avrill.)

The COURT.—He may give his understanding of it if he has any.

A. Well, I don't—there were two applications made for patent. This is one of them and there was another. That interfered with the Roberti patent I suppose. (Examining documents.)

The COURT.—Well, if you can't tell, that is a [118] sufficient answer.

Q. (By Mr. GRAHAM.) Referring to Exhibit "B," which is right before you, as I understand that is the mattress that you made first. Is that correct? A. No, it is not.

Q. Well, which one was it you made first?

A. The one on the other page.

Q. Which one is that?

A. This one here (indicating).

Q. Well, that is the one shown in Exhibit "B"; is that correct?

A. Well, there is more than one shown in Exhibit "B." There are two shown here.

Q. Then it was one of the mattresses shown in the drawings annexed to and forming a part of Exhibit "B"; is that correct?

A. They were both made, but this is the first one made and this is the next one made (indicating). They are not both the same.

Q. Referring to what figure?

A. This. If I understand it right, this has a strip—that these dotted lines indicate a strip going the full length, and this indicates a strip, this double fold here, with the eyelet running through, and this

(Testimony of Joseph F. Avrill.)

is the loop; then that is the one I made in 1914 at the Imperial Cotton Works. This is the one I made [119] in San Diego with the short strip doubled over and sewn with a machine and fastened with an eyelet there and connected with a string between the two. There are two different mattresses.

Mr. GRAHAM.—The witness first refers to figures 1 and 2, and in his subsequent description to the figures marked 3 and 4, as showing two different types of mattresses, in Exhibit "B."

Q. Now, referring to Exhibit "C," when did you make a mattress like that (handing paper to witness)?

A. That was made in San Diego in 1916, at about the same time; or in fact this second one.

Q. Then it was made after the first one, but before the mattress shown in figures 2 and 4 in Exhibit "B"; is that correct? A. Yes.

Q. Have you made any effort to get any of those mattresses that you made in 1916 or before?

A. I have not.

Q. How many mattresses altogether were made, Mr. Avrill, according to your drawings or plans?

A. Well, I couldn't state any amount because I didn't know. I didn't have charge of the shipping nor of the books.

Q. This first one that was made and put in the Imperial Cotton Works, was that ever actually used for a mattress?

[120] A. It was put in the display rack.

(Testimony of Joseph F. Avrill.)

Q. Then it was not even tested, that mattress, was it? A. Well, what do you mean by testing?

Q. Put into ordinary use such as a mattress is used for.

A. We have other ways of testing them besides sleeping on them.

Q. Well, was it ever put into actual service?

A. No.

Q. It was simply put on a display rack?

A. Yes.

Q. Now, when were the first mattresses made that were actually made and sold; do you recall that? A. They were made in San Diego.

Q. And you went to San Diego in 1916?

A. Yes.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—That is all.

TESTIMONY OF FRED W. WIDER, FOR PLAINTIFFS (RECALLED).

[121] FRED W. WIDER, recalled as a witness on behalf of plaintiffs, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Mr. Wider, you testified this morning that certain representations were made to you by a man who represented himself to be one Jonas. Is that correct? A. Yes.

(Testimony of Fred W. Wider.)

Q. Do you recognize that person in the room at the present time? A. Yes, sir.

Q. Will you point him out?

A. He is sitting in the second seat at the end.

Mr. GRAHAM.—Will you stand up, Mr. Jonas, please?

(Man stands.)

Q. Is that the gentleman? A. Yes, sir.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—May we not put Mr. Jonas on right now so as to clear this matter up?

The COURT.—Very well.

TESTIMONY OF MAX I. JONAS, FOR DEFENDANTS.

[122] MAX I. JONAS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BLAKESLEE.)

Q. Please state your name? A. Max. I. Jonas.

Q. Did you at any time ever call on the witness Mr. Wider who has just left the courtroom here?

A. Yes, sir; twice.

Q. In connection with the business of Jonas & Sons? A. Yes, sir.

Q. On any such occasion did you ever represent to Mr. Wider or anybody in his place of business that the defendants could furnish mattresses like the "Sanotuf" mattresses of the Roberti people?

(Testimony of Max I. Jonas.)

A. No, sir, I never did.

Mr. GRAHAM.—That is objected to as leading and instructing the witness. The question should call for the conversation that took place and let the witness state it in his own words.

The COURT.—I think the question would be proper. The objection is overruled.

Mr. GRAHAM.—Exception.

[123] Q. (By Mr. BLAKESLEE.) Did you ever represent to that witness Wider or anybody in his place of business or connected with him in business that the defendants could furnish "Sanotuf" mattresses? A. No, sir.

Mr. BLAKESLEE.—That is all.

Q. (By Mr. GRAHAM.) Did you ever represent that the mattress made by the defendants was the same like "Sanotuf"? A. No, sir.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—May the record show that Mr. Jonas who has just testified is one of the defendants in the case?

Mr. GRAHAM.—Yes.

TESTIMONY OF EDWARD WILLIAM FOX, FOR DEFENDANTS.

[124] EDWARD WILLIAM FOX, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Please state your name.

(Testimony of Edward William Fox.)

A. Edward William Fox.

Q. What is your occupation, Mr. Fox?

A. Traveling salesman.

Q. Were you ever engaged in the manufacture of mattresses, comforts and the like? A. Yes, sir.

Q. When?

A. From 1911 to 1915—the early part of 1915.

Q. Where? A. At Los Angeles.

Q. And what was the name of the company?

A. The Imperial Cotton Works.

Q. And what was your connection with them?

A. I was general manager and principal stockholder.

Q. Did you have working for you at said place a man by the name of Joseph Avrill?

A. Yes, sir.

Q. Did he just testify? [125] A. Yes, sir.

Q. How long was the Imperial Cotton Works in existence?

A. About five years; from 1911 to 1915.

Q. And where were they located in 1911?

A. At San Julian near Pico.

Q. And how long were they located there?

A. Three years.

Q. And then where did you go to?

A. To Sixteenth and Tennessee Streets at that time—Hooper Avenue now.

Q. Now, during the time they were located at the first address did Mr. Avrill construct any mattress which he claimed was an invention of his?

A. Yes, sir.

(Testimony of Edward William Fox.)

Q. What was such mattress?

A. It was a mattress that was made with eyelets and that was laced at the place of the tufting of the mattress. The lacing formed the "biscuits," as they term them, on a mattress without any tufts.

Q. Have you anything else to say as to the construction of that mattress?

A. The only thing that would be, the reason it was made in that style, at his suggestion, he made it, was that a mattress could be aired when getting flat and worn down; the mattress could be laid out in the [126] sun and air and the cotton would come back to life, and the lace put back again and the tufts or "biscuits" formed again. It was for the ventilation of the mattress.

Q. And what was done with that mattress after it was constructed?

A. It was placed in a salesroom.

Q. Now where was this mattress constructed—at your first or second address?

A. The lace mattress was constructed at San Julian Street—the first address.

Q. And in about what year?

A. It was either the latter part of 1911 or the first part of 1912.

Q. And it was placed on a display rack?

A. Yes, sir.

Q. For the view of salesmen and buyers?

A. Yes, sir.

Q. Do you know August or Edward Roberti?

A. Yes, sir.

(Testimony of Edward William Fox.)

Q. Did they ever call at your factory?

A. Well, Mr. Edward Roberti. I don't think I have ever seen Mr. August Roberti at the plant.

Q. Do you know of your own knowledge whether Mr. Edward Roberti saw such mattress constructed in accordance with Mr. Avrill's invention?

[127] A. I couldn't say that he saw the first one. He may not have.

Q. Did he see one such mattress?

A. He did at the new plant at 16th and Tennessee.

Q. When was that?

A. It was made in 1914. I couldn't state the exact date. I have been out of the mattress game since then.

Q. Have you any way of fixing that date?

A. No, sir, I have not.

Q. Was the mattress that Mr. Edward Roberti saw the same as the mattress that you had constructed at the first address you have mentioned?

A. No, sir.

Q. Did you have any conversation with Mr. Edward Roberti with reference to the mattress?

A. Yes. We were friends, and still are I guess.

Q. And what was said?

A. I showed him the mattress that was on display and explained as nearly as I could, not being a mattress maker, the construction of it, in a friendly manner.

Q. Do you recall any of your description given Mr. Edward Roberti? A. No, I do not.

(Testimony of Edward William Fox.)

Q. Have you described that mattress?

A. Well, as nearly as I could understand it, [128] not being a mattress-maker, I did.

Q. How did you describe it?

A. That it was made with eyelets for ventilation, and that there was a tie of some kind on the inside of the mattress to hold the filling.

Q. Did you see that mattress constructed?

A. No, sir.

Q. I show you Defendants' Exhibit "B" and also direct your attention to two drawings and will ask whether or not your description, the description you gave at that time, would coincide with any showing of the drawings, either one (handing document to witness).

Mr. GRAHAM.—That is objected to as leading and instructing the witness. He said that he didn't see the mattress constructed nor did he know the interior construction of it. Now in testimony of this nature it is the particular construction of the thing that counts and the witness has testified in fact that he did not know what that interior construction was.

Q. (By the COURT.) Did you know the interior construction of the mattress? A. No, sir.

The COURT.—The objection is sustained.

Mr. BLAKESLEE.—Exception.

Q. (By Mr. BROWN.) You have no knowledge of your own, then, as to the construction of the mattress on [129] the display rack?

(Testimony of Edward William Fox.)

A. Except what my superintendent told me about it.

Q. Who was the superintendent?

A. Mr. Avrill.

Q. What did Mr. Avrill disclose to you?

A. That there was a tab inside holding the filling, and he showed me how the twine was taken through and tied and let go through the eyelet, so that nothing but the eyelet would show on top of the mattress.

Mr. GRAHAM.—We object to that and move to strike out the answer as hearsay and as not part of this suit.

Mr. BLAKESLEE.—One of our defenses is prior knowledge of any invention on the part of Mr. Avrill, and all of this testimony goes to show that Mr. Avrill had that prior knowledge and was the prior inventor—or tends to prove that—so that it is not within the hearsay rule.

Q. (By the COURT.) Did you explain to Mr. Roberti in the same terms that you had been told how it was constructed?

A. Well, I might have. I am not positive, because it was nine years ago.

Q. Substantially so or not? [130] A. Yes.

Q. Mr. Avrill told you how it was constructed; now did you repeat that to Mr. Roberti?

A. I would suppose I did.

The COURT.—The objection is overruled.

Q. (By Mr. BROWN.) While you were in the

(Testimony of Edward William Fox.)

mattress business did you ever invent a mattress of your own?

A. No, sir. I invented a comfort.

Q. What was that comforter?

A. A ventilated comforter with eyelets.

Q. How was it constructed?

A. On the same principle, except there was no tufting in it. The eyelet would hold both the top and bottom cloth together.

Q. The eyelet was in the top and bottom cloth?

A. Eyelets in both sides.

Q. And what did you do with it?

A. Applied for a patent.

Q. Did you get a patent?

A. No, sir. It was not granted.

Q. Did you ever make any of the comforts?

A. Yes, quite a few. While the application was pending we made quite a number of them.

Q. Were they sold? A. Yes, sir.

Q. Where?

[131] A. In Los Angeles and elsewhere.

Q. When? A. Most of them in Los Angeles.

Q. When? A. That was about 1911.

Q. Who made them?

A. Well, the people in the factory. I couldn't state who made it.

Q. What factory?

A. At the Imperial Cotton Works.

Q. For what purpose were the eyelets?

A. Ventilation only. Ventilation of the bedding.

Q. No interior construction?

(Testimony of Edward William Fox.)

A. Nothing but cotton batting. Just a plain comforter.

Q. You say the eyelets went through from cover to cover? A. Yes.

Q. They didn't ventilate, then, did they?

A. Yes, they ventilated the bed.

Q. Holes put in the shaft of the eyelet?

A. Yes, there were double eyelets—on both sides.

Mr. BROWN.—That is all.

[132] Cross-examination.

(By Mr. GRAHAM.)

Q. Referring to that eyelet, you mean there was a double eyelet in that that extended all the way through the comforter and clinched the upper and lower covers of the comforter?

A. Yes, there were two eyelets. One clinched into the other. The eyelet was the same on both sides.

Q. And it clinched the upper and lower tick together; is that correct? A. Yes.

Q. And this ventilation you speak of was through the comforter? A. Yes, sir.

Q. And not from the outside to the inside of the comforter? A. Through the comforter.

Q. There were simply holes through the comforter where those eyelets were; there were no inside ties or anything of that kind?

A. No, sir.

Q. Now when was it you had this mattress on display that Mr. Avrill made?

(Testimony of Edward William Fox.)

A. Which one are you referring to—the first or second one?

[133] Q. The second one.

A. Some time in the fall—October. I couldn't state the date exactly.

Q. Are you willing to say positively that it was in October?

A. Well, that would be pretty hard. I couldn't positively say, no.

Q. You have no way of fixing the date?

A. No, sir.

Q. It might have been later on that year, might it not?

A. It might have been in September, and it might have been in December.

Q. You don't know?

A. No, sir, I couldn't swear to that.

Q. Now this mattress that was made in 1911, I believe you testified, when you were in your first place of business, had no inside ties, did it?

A. No, sir; the lace took the place of a tie.

Q. In other words, it had eyelets in it and the string would go through one eyelet, out the bottom and across? In other words, it was a lace effect?

A. Yes, sir.

Q. There were no inside ties or tabs or anything of that kind? A. No, sir.

[134] Q. Who made that mattress?

A. Mr. Avrill.

Q. Now those two mattresses—the one you testified to as being the laced mattress made in 1911

(Testimony of Edward William Fox.)

and the mattress which you had on the display rack some time in the latter part of 1914—are the only two mattresses made by Mr. Avrill that you know of?

A. That is, out of the ordinary run of mattresses, yes, sir. We made all kinds of mattresses.

Q. But they were the only two mattresses in which eyelets were used? A. Yes, sir.

Mr. GRAHAM.—That is all.

TESTIMONY OF JOHN SCANLON, FOR DEFENDANTS.

[135] JOHN SCANLON, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Please state your name.

A. John Scanlon.

Q. Where do you reside, Mr. Scanlon?

A. 6435 Fountain Avenue, Los Angeles.

Q. What is your occupation?

A. In the mattress renovating and upholstering business.

Q. Are you in business for yourself?

A. Yes. I have been, but I sold out about three weeks ago.

Q. Were you ever associated with the firm of Roberti Brothers? A. Yes.

Q. Who comprises that firm, do you know?

(Testimony of John Scanlon.)

A. Mr. Ed and Mr. August Roberti.

Q. Are they at present in court? A. Yes, sir.

Q. When did you first become associated with the firm of Roberti Brothers?

A. Oh, it was some time in 1910, about along in [136] June I think—May or June.

Q. And where? A. In Los Angeles.

Q. How long did you remain with them?

A. Well, I worked for them I guess, off and on, for about nine years.

Q. What was your position with them when you first became associated with them in 1910?

A. Mattress making; stitching.

Q. And when did you leave them first?

A. I left in the latter part of 1912; I think it was about in November or December. I went to another place.

Q. And what did you do then?

A. I went to work for L. W. Stockwell Company.

Q. And what business were they in?

A. Mattress manufacturers.

Q. And what did you do there?

A. Making mattresses.

Q. How long were you associated with the Stockwells?

A. Well, I went there about in either November or December, 1912, and I worked there all of 1913, and came back to Roberti Brothers in I think it was January or February, 1914.

Q. How do you fix that date?

(Testimony of John Scanlon.)

[137] A. Well, it seems like all the changes I ever made were around in the winter-time some time. I know it was either in January or February, 1914; I am very nearly certain of that.

Q. And what did you do when you returned to the firm of Roberti Brothers?

A. I took charge of the mattress department as foreman.

Q. Do you know a William Daniel?

A. William, yes. We always called him Rufus Daniel. That is the name I knew him by.

Q. Is he present in court? A. Yes, sir.

Q. Do you know of your own knowledge whether Mr. Daniel was associated with the firm of Roberti Brothers at that time?

A. Yes, he was there when I first came there, and he left and went to San Francisco.

Q. Was he at the firm of Roberti Brothers when you returned to that firm in 1914, in February or in January? A. No, he was not there then.

Q. How long did you stay with the firm of Roberti Brothers as foreman in the mattress department?

A. Up until about the latter part of September, I think, 1919.

[138] Q. When you first met Mr. Daniel at Roberti Brothers what was his occupation?

A. He was foreman of the mattress department when I came there in 1910.

Q. And do you know a Joseph Avrill who has just testified?

(Testimony of John Scanlon.)

A. Yes, sir, I know him.

Q. Was he ever associated at Roberti Brothers, of your own knowledge?

A. Well, the first time I ever met Mr. Avrill that I know of, he came there some time along—I don't know what year it was, but it seems like about 1910, I believe, or 1911—and I was kind of sick, so he worked in my place for a couple of weeks and I laid off. Then when I came back again I don't know where he went to. I can remember that incident anyhow because it was the first time I met him.

Q. Now in 1914 when you returned to the employment of Roberti Brothers what type of mattress were they manufacturing?

A. Well, just the ordinary run of mattresses. They made different grades of mattresses.

Q. What were some of the grades like?

A. Well, staple cotton, and short cotton, and floss, hair, and things like that, at different prices of course.

[139] Q. Were they tufted mattresses?

A. Yes. Well, everything was tufted.

Q. I call your attention to Plaintiffs' Exhibit 4. Were they manufacturing a mattress like that at the time that you returned in 1914?

A. No, they were not doing it then.

Q. Were you at the factory of Roberti Brothers when they first commenced to manufacture a mattress like Plaintiff's Exhibit 4?

(Testimony of John Scanlon.)

A. Yes, I was there when they first started to manufacture that mattress.

Q. When was that?

A. Well, that is the thing that—it seems to me it was in 1915 before we started to make them, that is, to get them on the market. They were making them some time, I think, before they ever got their patent. Of course their patent was applied for, as far as I can understand; I expect it was.

Q. Did you work on any such mattresses?

A. Yes. I used to make all the samples. Just the small forms to make the samples and things like that.

Q. Now, when you first commenced the making of a mattress like Plaintiffs' Exhibit No. 4 was it in the form in which it is in at present? Please examine that mattress.

[140] A. Well, before they put it on the market, before they got it well on the market, we did a little revising on it. There was very few of them went out only with the tabs on them, and of course the tabs didn't hold, and we decided a strip would be the next thing. There was very few of them sent out with just the tabs on them, because they didn't hold.

Q. Now the first form of mattress manufactured simply had tabs?

A. The first few we made just had tabs on, the samples.

Q. Where were the tabs located?

(Testimony of John Scanlon.)

A. Right under the eyelets.

Q. To what were the tabs connected?

A. Well, they were sewed across with the thread, you see, and it seems that in experimenting with them either Edward or August—I don't know which—figured out that the strip would be the best across, and of course it naturally was.

Q. And where was the eyelet located in the top?

A. Right where it is now. It was a little bit farther away from the strip. Of course it only took a little experimenting to put that eyelet up closer to pull it down tighter.

Q. How long were you experimenting on the mattress until you got it in final form such as shown [141] in Plaintiffs' Exhibit No. 4?

A. Oh, we were not very long doing that.

Q. Well, approximately how long?

A. Oh, two or three weeks I should judge. I don't think it was much more than that.

Q. Was anything said to you as to who invented the present form of mattress as shown in Exhibit 4?

A. No.

Mr. GRAHAM.—That is objected to as hearsay.

The COURT.—That is, you mean by some of the Robertis?

Mr. BROWN.—The plaintiffs, yes.

The COURT.—Yes.

A. No, nobody ever said anything to me about —you mean who—

Q. Did you do any of the inventing of that said mattress? A. No.

(Testimony of John Scanlon.)

Q. With whom did you discuss the said mattress at the Roberti factory?

A. I didn't discuss it any. August Roberti got the design, or got the idea, as I thought; I don't know how he got it or where; and we just made the mattress up.

Q. Now when this mattress first came to your attention did either August or Edward Roberti claim to [142] be the inventor of it?

A. I couldn't say which one was the inventor, but August and I worked the most on it. He would get the little samples agoing and I made it. That is, I made it out of cotton, and then they made forms, you see, just like these exhibits you see here and things like that.

Q. Well, did either of the Robertis at that time claim to be the inventor of this mattress?

A. Well, I always did think August was the one that invented it because he was the one that was doing the most work on it, he and I together.

Q. You have stated that the eyelets were farther away than their present location. Was it necessary to experiment as to the location of the eyelets?

A. Well, we put the eyelets so far away that when you would run your needle in it would pull the eyelet out; and some of the boys would put their needle in and bear down on the eyelet and pull it out, and by pulling it up closer you could get a shoot straight through; you could get it better, without straining the eyelets. It didn't take much experiment when we saw that.

(Testimony of John Scanlon.)

Q. Now do you penetrate the tab on the interior of the tick with a cord or needle?

A. Yes, the tab is put on there in such a way [143] that when the bed would run out the tab goes out with the bed; but in beating them out sometimes of course the tab is beat down with the cotton and you couldn't tell where it was located until you regulated it. Then when you regulate it out you can feel with your needle, as any mattress stitcher can, whether you are getting hold of it or not.

Q. Now, as a mattress-maker, I ask you if the eyelet were located at the stitching point while the tab is joined would the mattress function just the same? A. If the stitching is what?

(Last question read.)

A. I don't think I understand that.

Q. In other words, if, instead of locating the eyelet to one side of the stitching here, you locate it right in line with the stitching,—

A. Well, it would practically be the same thing.

Q. You would engage the tab just the same?

A. Yes. It is just a matter of getting hold of the tab, that is all. It is a question of whether the tab is in line there.

Q. And you experimented for three or four weeks before you finally located the exact position of that eyelet?

A. Well, not in that way. The tabs were put on first, and then the strip, and then it was just a

(Testimony of John Scanlon.)

[144] matter of a little experimenting where the eyelet was to go.

Q. Did you ever have any conversation with Mr. Roberti or either one of the Robertis as to the object they desired to accomplish with this new form of mattress? A. No, I did not.

Q. Do you know what result they were attempting to get or what result you were attempting to get for the Robertis in any work on these mattresses?

A. Well, I was working for their interests at that time.

The COURT.—He means what advantage was there in making a mattress that way.

A. Oh, anything that is new, or a patent, like that, of course it was an advantage to get it out if it was marketable or would sell.

Q. Was it any better than the mattresses?

A. Well, I think it was better in a way. It is a talking point.

Q. Well, in practical use was it any better? For the person that had to use it would they find it any better?

A. Well, I couldn't say that they would, no.

Q. (By Mr. BROWN.) Will that mattress stretch, such as shown in Exhibit 4?

[145] A. Well, I think any mattress that is tufted either inside or outside, when the ticking is drawn it will stretch.

Q. Would you say that the mattress shown in Exhibit 4 was a ventilated mattress?

(Testimony of John Scanlon.)

A. No, I wouldn't say it was ventilated. I wouldn't say any mattress was ventilated.

Q. And you would say that that mattress would stretch?

A. Any mattress that is pulled down and has dents in it would have to stretch. What I mean by dents is pockets.

Q. Now, I believe you said you worked with Stockwell. What Stockwell was that?

A. The L. W. Stockwell Company.

Q. And their business was mattress manufacturing? A. Yes.

Q. Was that the Stockwell that manufactured the Stockwell never-stretch mattress? A. Yes.

Q. Does that mattress stretch? Do you know that of your own knowledge?

Mr. GRAHAM.—That is objected to as immaterial.

Mr. BROWN.—It it a matter of degree, your Honor.

Mr. GRAHAM.—There is nothing here to show the construction of that mattress.

[146] The COURT.—The objection is sustained.

Q. (By Mr. BROWN.) Do you know of your own knowledge and is it not a fact that at the time you were with Roberti Brothers, at the time the mattress like Exhibit 4 was constructed, you were trying to find a mattress that would compete with other mattresses in the market?

Mr. GRAHAM.—That is objected to as incompetent, irrelevant and immaterial.

(Testimony of John Scanlon.)

The COURT.—The objection is overruled.

A. Yes, sir.

Q. (By Mr. BROWN.) Was there a demand for a better mattress?

A. Well, there was always a demand for anything better. The idea was at that time to get something to compete with the other mattress shops, or get something better, as a leader, as far as I could see.

Mr. BROWN.—That is all.

Mr. GRAHAM.—No cross-examination.

TESTIMONY OF WILLIAM R. DANIEL, FOR DEFENDANTS.

[147] WILLIAM R. DANIEL, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Please state your name.

A. William R. Daniel.

Q. Your occupation? A. Mattress-maker.

Q. And where do you reside? A. Fresno.

Q. Are you in business for yourself?

A. Yes, sir.

Q. How long have you been in business for yourself? A. Eight years.

Q. What business? A. Mattress business.

Q. Were you ever associated with the firm of Roberti Brothers? A. Yes, sir.

(Testimony of William R. Daniel.)

Q. Who comprised that firm, do you know?

A. Mr. August Roberti and Mr. Ed Roberti.

Q. Are they present here in court?

A. Yes, sir.

Q. When did you first become associated with the firm [148] of Roberti Brothers?

A. It was 1908 or 1909 I am not sure which.

Q. In what capacity?

A. As mattress-maker, and afterwards as foreman.

Q. And when did you leave their employment?

A. In 1913.

Q. During the time of your employment was there an Ella Green employed by the firm of Roberti Brothers? A. Yes.

Q. Was there an employee by the name of Joseph Avrill? A. Yes.

Q. Was there an employee by the name of John Scanlon? A. Yes.

Q. Now, during the time you were associated with the firm of Roberti Brothers did you invent a mattress? A. Yes, sir.

Q. I show you Defendants' Exhibit "D" and ask you if this is your signature (indicating).

A. Yes, sir.

Q. Do you recall whether or not you applied for a patent on your said invention of a mattress?

A. Yes, sir.

Q. And do you recall who the attorney was that you went to? A. Hazard & Strause.

Q. Now, who directed you to Hazard & Strause?

(Testimony of William R. Daniel.)

[149] A. Miss Ella Green.

Q. You asked her for the name of patent attorney? A. Of a patent attorney, yes.

Q. And then what did you do?

A. I went to Hazard & Strause and applied through them for the patent.

Q. Did you ever apply for any other patent?

A. No.

Q. Have you any patents? A. No.

Q. Have you ever dealt with any other patent attorney? A. No, sir.

Q. Did you ever construct a mattress in accordance with your invention? A. A model.

Q. And where did you construct it?

A. At home, in Los Angeles.

Q. Now, I ask you to please refer to this Exhibit "D" and ask whether or not you constructed your model in accordance with that showing (handing document to witness).

Mr. GRAHAM.—That is objected to as not the best evidence. He should first describe the construction without having a leading question and without the construction about which he is to testify being placed in his hands.

Mr. BROWN.—I will withdraw it.

Q. Regarding this model mattress manufactured for you, [150] please describe the same.

A. Well, it was a mattress with a tick as any ordinary mattress would be made, with strips sewed on the inside, bottom and top, and a hole poked over this strip, or by the side of them, and

(Testimony of William R. Daniel.)

a needle inserted through the top tick, caught into the bottom, into the strip that goes across, and down through the filling into the strip on the bottom part of the ticking, and then through the hole and back up the same as it went down. Then this twine was tied, pulled through the hole, and cut off.

Q. Now, when did you make this model—what year? A. It was in 1913.

Q. And how do you fix that date?

A. Well, it was shortly before I quit Mr. Roberti, and I quit there in the spring of 1913, I think in May.

Q. What did you do with the model?

A. I left that with Mr. Smith.

Q. Have you that model? A. No, sir.

Q. Have you looked for it? A. Yes, sir.

Q. Do you know what has happened to it?

A. Through correspondence with Mr. Smith, he said it has been destroyed.

Q. Did you ever show that model to others?

A. Yes.

[151] Q. When?

A. Well, the first time was the day I got my receipt from Washington, D. C., with the serial number, and I had taken it over to the factory to Mr. Roberti, and I showed it to Miss Ella Green, Mr. Clark, Mr. August Roberti, and a Miss English, but I had forgotten her name.

Q. And what conversation did you have at that time?

(Testimony of William R. Daniel.)

A. Well, it was just merely showing them the mattress and showing them what I had applied for; that is, the construction of it; and that I had applied for a patent.

Q. Did you describe the mattress?

A. Yes, sir.

Q. I show you what purports to be a drawing and ask you if you know anything concerning the same. A. Yes, sir.

Q. What do you know?

A. I know that is the drawing that was made at Hazard & Strause's, patent attorneys' office, for the mattress that I applied for patent for.

Q. Is that the drawing that you showed at the time you explained your mattress?

A. This is the original drawing I showed to the people in the office.

Q. It was furnished you by Hazard & Strause?

A. Yes, sir.

Q. Did you show it to Ella Green?

[152] A. Miss Ella Green, Mr. Roberti, Mr. Clark, and the assistant bookkeeper—a lady.

Q. And when did you show it?

A. That would be the last of February or along in the first of March, 1913.

Q. I likewise call your attention to a description attached to this drawing and ask if that was likewise furnished to you by Hazard & Strause (handing same to witness). A. Yes.

Q. And do you know whether or not that descrip-

(Testimony of William R. Daniel.)

tion follows the drawing prepared by your patent attorney under your instruction? A. Yes, sir.

Q. And did you show the description as well as the drawing to Mr. August Roberti, Miss Ella Green, Mr. Clark and Miss English? A. Yes, sir.

Q. At that time did you describe the drawing and the mattress construction in detail to those present? A. Yes, sir.

Q. Did you state how the mattress was put together? A. Yes sir.

Q. Do you recall any conversation or remarks made by Mr. August Roberti?

A. No, I can't say that I can more than he looked at it and said it looked all right; but he didn't take practically [153] any interest in it. My object in taking it over there was to see if he would be interested in it and sell it to him if I could.

Mr. BROWN.—I wish to introduce this drawing and specification in evidence at this time as fully identified, and as Defendants' Exhibit "T."

The COURT.—It may be filed.

Mr. GRAHAM.—How much of this is introduced?

Mr. BROWN.—Just the specification and the drawing.

Mr. GRAHAM.—Do you claim there is any difference between this and the specification and drawing as filed in the Patent Office?

Mr. BROWN.—Not between that and the certified copy.

Mr. GRAHAM.—In other words, you simply

(Testimony of William R. Daniel.)

wish to show that this is a particular paper that was shown by him?

Mr. BROWN.—Yes.

Q. Did you at any time show your invention or model or application papers or the drawing to anyone else other than Mr. August Roberti?

A. I think I showed it to Mr. Smith; and the model was seen by several mattress-makers that worked in the factory.

Q. Did you obtain a patent on this mattress?

A. No.

Q. Is it abandoned, do you know?

A. I don't know.

[154] Q. Were you ever notified that it was abandoned? A. No.

Q. Your attorney never informed you as to any abandonment of your application for patent?

A. No.

Q. When did you first learn that your application was abandoned?

A. Mr. Alexander came up to Fresno a few weeks ago and informed me of the suit between Roberti and Jonas, and that is how I found it out.

Q. Have you taken any steps to revive your abandoned application? A. No.

Q. Do you intend to do so? A. Yes, sir.

Q. And you didn't instruct your attorneys to abandon the application for patent?

A. Oh, no.

Q. Now, I will ask you to take your structure as shown in your patent drawing and point out the

(Testimony of William R. Daniel.)

differences, if any, between such structure and Exhibit 4, being the exhibit of plaintiffs.

A. Well, the strip in here has a tab where mine has not (indicating on document). My twine catches through the strip instead of through the tab. We merely sew a strip on there and then sew a tab on to the strip, and then [155] catch through the tab; where mine is a longer strip, practically the same distance as their tab and strip together, and I catch through the strip.

The COURT.—Make a loop out of the strip?

A. No loop. We catch into the bottom part of that strip as nearly as we can.

Q. (By Mr. BROWN.) Then there is no difference, to your knowledge, between the showing of the drawing of your mattress and Plaintiffs' Exhibit 4, with the exception of the tab?

A. That is all I can see.

Q. Do you use a metal eyelet in the tick?

A. No, sir.

Q. What do you use?

A. I made a hole with the regulator the size of—it will be about a quarter of an inch across—just about the size of this eyelet; then afterwards I would scratch that and that would make a plain surface without any opening.

Q. What is the regulator?

A. It is what you use to get your mattress in condition to stitch the tuft after it is filled.

Q. Do you penetrate with the regulator the cross-strip? A. No, sir.

(Testimony of William R. Daniel.)

Q. What do you do? A. The outside tick.

[156] Q. (By the COURT.) You use no needle at all? A. A needle to carry the tuft.

Q. To carry the cord through? A. Yes.

Q. You mean on the outside of the tick you press the tick fabric apart so as not to cut it?

A. That is right, with a round-pointed instrument.

Q. Have you ever seen one of the "Sanotuf" mattresses before to-day? A. Yes, sir.

Q. Where? A. In my shop.

Q. And for what purpose was it there?

A. The mattresses to be worked over.

Q. And when did you learn first that "Sanotuf" mattresses were being manufactured?

A. Well, I would think it was in 1915.

Q. And at that time would you suppose that your application for a patent was still pending in the Patent Office?

A. Yes. I don't think this was patented though (handling papers); I thought this was a "Sanotuf" copyright—the name copyrighted and not the way the mattress was made.

Q. You thought your application was still pending in the United States Patent Office?

A. Yes, sir.

[157] Mr. BROWN.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. Did you ever make any inquiries as to whether your application was still pending or not?

(Testimony of William R. Daniel.)

A. No. Not after I left Los Angeles.

Q. When did you leave Los Angeles?

A. July 2, 1913.

Q. So since July, 1913, until 1924, you never made any inquiries about your application?

A. Not directly, but through Mr. Smith.

Q. What inquiries did you make through Mr. Smith?

A. He was in Los Angeles here and he would go and see Hazard & Strause, or was supposed to.

Q. Did he report to you? A. One time.

Q. When was that?

A. Oh, I don't remember just the date. It would be sometime in the latter part of 1913.

Q. Then Mr. Smith was acting as your representative in negotiating with your attorneys; is that correct? A. Yes, sir.

Q. Did he receive mail from you?

A. There were two that I know of.

Q. Two what?

[158] A. Two communications from—

Q. And you received those? A. Yes, sir.

Q. And what was the nature of those communications?

A. Well, one was—I don't know how to explain it, but it was a communication from Hazard & Strause claiming that for some reason the patent would not be issued but they were, amending their first—well, the first application, and they thought they would get a more favorable reply. I believe that was just about—

(Testimony of William R. Daniel.)

Q. Now, when did you become interested in this matter again? A. Three or four weeks ago.

Q. And how did you become interested?

A. Through Mr. Alexander.

Q. Where did Mr. Alexander see you?

A. At Fresno.

Q. Well, what did you do after you had a talk with Mr. Alexander?

A. I went to Mr. Cook, an attorney.

Q. And what did Mr. Cook tell you?

A. I went to him in regard to this mattress proposition.

Q. And he sent you somewhere else?

A. He advised me to come to Los Angeles and see a patent attorney here, someone that was not connected with [159] the case in any way, and get advice from him, and he suggested Lyon & Lyon.

Q. Did you ask anybody about your application?

A. I went to Lyon & Lyon, and he said he wasn't connected with it in any way, but he couldn't handle the case, and he advised me to come and see you. I went to see you and then I went to see Mr. Brown; so I saw you all.

Q. And what did you talk to me about?

A. About selling my rights in this mattress.

Q. Please state fully what your conversation was at that time.

A. The substance was if I had anything here and I had anything coming out of it I would like to know if I could get it. You called Mr. Roberti

(Testimony of William R. Daniel.)

and Mr. Roberti came, and he said if I had any rights in it it would be shown in court.

Q. To bring your claims to the court and if you had any claims they would be settled here?

A. It would be shown here.

Q. Now, you have never taken any steps aside from through Mr. Smith in 1915 to find out anything about your application? A. No, sir.

Q. You were not very much interested in it, were you?

A. Well, about $110 or $115 worth of hard earned money.

Q. But you were not interested enough to follow it up, [160] were you?

A. Well, I don't know—I didn't understand the proceedings of the Court or of patent attorneys.

Q. Well, you didn't think very much of this alleged invention yourself, did you?

A. Well, I didn't have much opportunity to find out whether it was any good or not.

Q. Were you not in the mattress business?

A. Yes, sir.

Q. Didn't you ever make any of these mattresses and sell them? A. No, sir.

Q. You simply made a model?

A. That is all.

Q. Will you please describe the way you put the ties in that model which you made?

A. Why, we inserted the needle through the upper tick, caught into the strip, and the same below, and came back through the same hole we started

(Testimony of William R. Daniel.)

through and tied the knot and then pulled it down through the hole and cut it off.

Q. Then what did you do after that?

A. It was all done then.

Q. Did you leave the hole open?

A. No; we had a regulator and scratched the hole and closed it up.

[161] Q. Then you don't have any permanent hole in the tick, do you? A. No, sir.

Q. You simply make a hole to get the knot through? A. Yes, sir.

Q. And then close the hole up? A. Yes.

Q. And haven't any permanent opening in either the upper or lower tick member? A. No, sir.

Q. Do you have any tabs in there? A. No, sir.

Q. And you made that model that you spoke of at home? A. Yes, sir.

Q. I call your attention to Defendants' Exhibit "D"—

The COURT.—You probably will not be able to finish your cross-examination to-night. I think it is the plan that the Court should adjourn during some portion of to-morrow at any rate by reason of President Wilson's funeral. I think we will hold a morning session and then adjourn for the afternoon. We will go on in the forenoon, but it will be understood there will be no session in the afternoon.

(An adjournment was thereupon taken until Wednesday, February 6, 1924, at ten o'clock A. M.)

(Testimony of William R. Daniel.)

[162] Wednesday, February 6, 1924, 10 A. M.

WILLIAM R. DANIEL (recalled) for further Cross-examination.

(By Mr. GRAHAM.)

Q. Mr. Daniel, did you ever inquire of Mr. Smith about your application for patent? A. Yes, sir.

Q. And what did he tell you?

A. Do you mean about the model?

Q. No; about the application.

A. Oh, I can't tell you that. I don't remember.

Q. You don't remember? A. No, sir.

Q. Did he ever send you any correspondence about the matter? A. Yes, sir.

Q. Correspondence that he had received from the patent attorney? A. Yes, sir.

Q. And you don't recall whether you ever made any inquiries other than that from Mr. Smith about the application? A. No, sir.

[163] Q. What kind of a needle did you use, Mr. Daniel, in making that model which you spoke of? A. An ordinary mattress needle.

Q. How did you make the hole in the bottom of the mattress, or in the bottom of the tick?

A. With a regulator and I waxed the regulator and opened the hole.

Q. You never used any eyelets, did you?

A. No, sir.

Q. And you have never made any mattresses,

(Testimony of William R. Daniel.)

full-sized mattresses, embodying the invention that is set forth in your application for patent?

A. No, sir.

Q. And you have been in the mattress business ever since 1913? A. No.

Q. Have you been in the mattress business during any of that time? A. About eight years.

Q. When was that?

A. From eight years ago until now.

Q. And in that model you didn't have any loops or tabs, did you? A. No, sir.

Q. Mr. Daniel, after your conversation with me what did you do next? Who did you next see about this case? [164] A. Mr. Brown.

Q. Did you ever talk to Mr. Jonas?

A. After I talked to Mr. Brown, yes.

Q. Didn't I understand you to say that you were attempting, or made an offer to sell something with respect to this invention of yours?

A. If I had anything coming, yes; if I had any rights I wanted to get what I had in it out of it.

Q. Did you make any disposition or agreement with Mr. Jonas regarding your papers showing your application?

A. I don't know that Mr. Jonas ever saw the papers.

Q. Well, did you make any agreement with him?

A. None whatever in regards to me testifying here.

Q. Did he make any offer of any kind to you if you would testify here?

(Testimony of William R. Daniel.)

A. He was to pay my expenses, of course.

Q. And what else? A. In what way?

Q. Didn't he agree to pay the expenses in connection with the renewal, or attempted renewal, of your application?

A. If it is to be renewed he will pay the expenses for it, yes.

Q. Anything in addition to that? A. Sir?

Q. Anything in addition to that? A. No.

Mr. GRAHAM.—That is all.

[165] Redirect Examination.

(By Mr. BROWN.)

Q. Mr. Daniel, in regard to your testimony given yesterday, did I understand you to say that the opening in the tick was not permanent?

A. It is put in with a regulator and that opens the goods. It is not sewed up. It is still there but it does not stand open as they do with an eyelet in it.

Q. But the opening is there all the time?

A. The opening is there.

Q. (By the COURT.) You work it back so that it doesn't show? Isn't your idea to work it back so that it doesn't show?

A. You can take a regulator and scratch it. The goods is not cut.

Q. I say, isn't that your purpose?

A. Yes, sir, to close the hole.

Q. So that your endeavor is not to leave a hole there? A. Yes, sir.

(Testimony of William R. Daniel.)

Q. (By Mr. BROWN.) Can you get the needle through the hole just as easily as if you had a metal binding? A. Yes, sir.

Mr. BROWN.—That is all.

Mr. GRAHAM.—Mr. Brown, did you put in evidence the certified copy of the application of Mr. Daniel?

Mr. BROWN.—Yes, sir.

[166] Recross-examination.

(By Mr. GRAHAM.)

Q. Is that your signature? A. Yes, sir.

Q. And that is the oath that you signed when you made that application for patent? A. Yes, sir.

Q. I call your attention to the page marked "3" in Exhibit "D," wherein it reads as follows: "This knot 18 is then passed through the opening 11, which latter opening and that formed at 15,"—in other words, the opening in the upper tick and the opening in the lower tick—"will entirely close in the usual mattress fabric without indicating the position of passage of the cord." You made that statement under oath at the time you made the application, did you not? A. I did.

Q. So, as a matter of fact, this opening that you have testified that you put in the upper and lower tick closes entirely, does it not?

A. It can be closed entirely, yes.

Q. It does close entirely?

A. It can be closed entirely.

Q. It was your intention that it should be closed entirely, wasn't it? A. If I wanted to, yes.

(Testimony of William R. Daniel.)

Mr. GRAHAM.—That is all.

[167] Redirect Examination.

(By Mr. BROWN.)

Q. Mr. Daniel, referring to Exhibit "D," and particularly to the drawing, did you describe all the forms of your invention to Mr. August Roberti?

A. Yes, sir.

Q. And I call your attention to figures 3, 4 and 5. Does that differ, the structure shown in said figures, from the showing in figures 1 and 2 of said application?

A. That showed how those tabs could be put on there. This is the tab. I didn't intend to use that unless this didn't work exactly right, but this was the most practical way to fix it with the strip and sewing through the strip, and I just put these in there just to illustrate how it is done, how the needle goes through there and how it catches into that strip that comes below.

Q. Did you describe the structure of figures 3 to 5 to Mr. Roberti?

A. Yes, sir; I described the whole thing to him. They could see this just as plain as could be and the sample was open where they could see where the twine comes into the strip the same as in these mattresses here.

Q. Did the needle penetrate the tab, as you call it, in figures 3 to 5? A. Yes, sir.

Q. And do you call that a tab?

[168] A. No, sir.

Q. What is it? A. I call it a strip.

(Testimony of William R. Daniel.)

Q. In figures 3 to 5?

A. Oh, in 3 and 5 you would call those—well, I would call that a tab.

Q. And the needle penetrated the tab?

A. Yes, sir.

Q. And did the cord?

A. The cord went around and tied just the same as in this tab and strip here.

Mr. BROWN.—That is all.

Recross-examination.

(By Mr. GRAHAM.)

Q. I call your attention to figure 1 of that drawing, Mr. Daniel, that part showing the tie in place. Is there any indication of an opening in the tick there?

A. Well, it don't show it in 1, no, but in 2 it does where your twine goes through.

Q. In figure 1 it shows the completed tick, does it not? A. Yes, sir.

Q. And it shows the hole, if there was any there—

A. "18" shows the hole.

Q. "18" shows a knot, doesn't it?

A. "18" shows where the twine goes through the tick.

[169] Q. In the specification in the part I referred to before on page 3 it says: "This knot 18." So that does not refer to any hole, does it?

A. Well, I can't say that, I don't remember, but just from the looks of this it looks—

Q. I call your attention to figure 5. That shows the tie in place and completed, does it not?

(Testimony of William R. Daniel.)

A. Figure 5, yes, sir. That is just to show how this in a small way, like figure 1, would be.

Q. It does not show any hole in the tick, does it?

A. No, sir. 2 shows it.

Q. This part that you have referred to as a tab, what is that?

A. It was just a piece of ticking sewed on to the cover.

Q. The drawing indicates a round piece of ticking? A. Yes, you could use it round.

Q. And it is sewed directly to the upper tick, is that correct? A. Yes, sir, with a pocket like to it.

Mr. GRAHAM.—That is all.

Redirect Examination

(By Mr. BROWN.)

Q. Mr. Daniel, referring to figure 2, does the cord in that showing pass through the upper tick?

[170] A. Yes, sir.

Q. And is number 11 an opening in that upper tick?

A. Nmber 11 is the opening, yes, sir.

Q. And is nmber 15 the opening in the bottom tick? A. 15 is the opening in the bottom.

Mr. BROWN.—That is all.

Recross-examination.

(By Mr. GRAHAM.)

Q. And those openings are there when the mattress is being made is that correct?

A. Yes, sir.

(Testimony of William R. Daniel.)

Q. And they are not permanent openings, are they?

A. They can be closed or they can be left open.

Q. Please answer the question. They are not permanent openings, are they?

A. I have never made any and put on the market, no.

Mr. GRAHAM.—That is all.

A. There was no chance to see whether it was to be left open or closed.

Q. (By the COURT.) The tendency would be in use for them to close? A. Yes, sir.

Q. They would work closed unless they were fastened open?

A. Yes, but they can be opened again.

[171] Q. Oh, yes, you can make a hole in a fabric, I suppose?

A. Yes, without cutting the goods.

Mr. BROWN.—That is all. Mr. Robbins, take the stand.

TESTIMONY OF ANDREW I. ROBBINS, FOR DEFENDANTS.

[172] ANDREW I. ROBBINS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BLAKESLEE.)

Q. Mr. Robbins do you reside in Los Angeles?

(Testimony of Andrew I. Robbins.)

A. In Inglewood.

Q. And your age is what? A. Forty-six.

Q. And your business?

A. I am a buyer of the furniture department of The Broadway Department Store.

Q. At 5th and Broadway, Los Angeles?

A. 4th and Broadway.

Q. Have you bought for that store mattresses made by both the plaintiffs and defendants in this case, that is, the mattresses of the Roberti Company and also of Jonas & Sons? A. I have.

Q. And they have both been sold through that store? A. They have.

Q. At any time when the mattresses of defendants were sold to you, in any talk or discussion of same was any representation made that such mattresses were the product of the plaintiffs?

[173] A. No, sir.

Q. Was any representation made at any such time that the products of the defendants were the same as plaintiff's products? A. No, sir.

Q. Or that the products of defendants were "Sanotuf" mattresses? A. No, sir.

Mr. BLAKESLEE.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. What was said the first time you were approached by defendants for the purpose of buying mattresses?

A. The defendant approached me with what he

(Testimony of Andrew I. Robbins.)

called his "Tiednotuf" mattress. I was rather reluctant to buy the mattress because we had had some little difficulty with a seemingly tied mattress such as the "Sanotuf," and I was somewhat under the impression that we got a better product in the old time way of making mattresses. He represented to me that he thought his process was of a little better type of tying than the people who made the "Sanotuf" mattress

Q. Is that all he ever said to you with reference to a comparison of the two mattresses?

A. That was all.

[174] Q. And are the mattresses that you bought from both the plaintiffs and defendants supposed to be the same grade of mattress?

A. No, not necessarily. I don't think that I ever bought any of the felted mattresses from the defendants I bought some silk floss or Kapot mattresses.

Q. Are they a higher grade or a lower grade mattress?

A. They are supposed to be rather a high grade mattress.

Q. In other words, it is the best mattress?

A. Well, it is a different type of material entirely and it would rate in comparison similarly to the better type of felted mattresses.

Q. Then for the same grade of plaintiffs' mattress and the same grade of defendants' mattress did you pay less for the defendants' mattress than you did for the plaintiff's mattress?

(Testimony of Andrew I. Robbins.)

A. The question is rather an unfair question from the standpoint of the fabrics being so diametrically different or opposite.

Mr. BLAKESLEE.—A little louder, please, Mr. Robbins.

Q. (By Mr. GRAHAM.) I asked you to compare the same grade of mattresses made by plaintiffs and defendants and to state whether or not you bought the defendants' mattress at a lower price than the plaintiffs'?

A. Never having bought them in that way I couldn't say.

Q. You will not say that you did not pay less for the defendants' than the plaintiffs', is that correct?

[175] A. I paid less for the defendants' mattress than I would have paid for the plaintiffs' Kapot mattress, had I been buying a Kapot mattress from the plaintiff at that time.

Q. Then as I understand your testimony you paid less for the defendants' than you did for plaintiffs' Kapot mattress, is that correct?

A. I paid less than I would have paid had I been buying the plaintiffs' mattress.

Mr. GRAHAM.—That is all.

Redirect Examination

(By Mr. BLAKESLEE.)

Q. You were subpoenaed to testify here, were you not, Mr. Robbins? A. Yes, sir.

Mr. BLAKESLEE.—That is all. Mr. Gaines, take the stand, please.

TESTIMONY OF WALTER O. GAINES, FOR DEFENDANTS.

[176] WALTER O. GAINES, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BLAKESLEE.)

Q. State your age, residence, and occupation, Mr. Gaines.

A. Twenty-nine years old; Assistant Buyer of the Furniture Department of The Broadway Department Store; residence, Los Angeles.

Q. You were subpoenaed to testify here?

A. Yes, sir.

Q. Did you ever buy any mattress products of the defendants in this case, Jonas & Sons?

A. I have.

Q. Over what period of time?

A. How long ago do you mean?

Q. During what period of time, beginning and ending?

A. Well, it is several months ago, the first purchase, and we haven't bought any other mattresses I would say, or I haven't anyway, in the last three or four months.

Q. Have you also bought mattresses from the plaintiffs, the Roberti people? A. We have.

Q. And handled both at the same time?

A. No, sir.

[177] Q. Which are you handling now?

(Testimony of Walter O. Gaines.)

A. We haven't either.

Q. Which did you buy last?

A. The floss mattress from Jonas.

Q. Were those bought upon the solicitation of orders by salesmen from the defendants, the Jonas people?

A. The first purchase Mr. Robbins made. I didn't make the first purchase. I merely followed in with orders that came from the sample.

Q. Did you come in contact at all with the defendants or their salesmen in these transactions?

A. I have talked with Mr. Jonas, Sr.,

Q. At your place of business? A. Yes, sir.

Q. Did he, or any one representing the defendants, at any time make any representation to you in this connection that the mattresses of defendants were the same as the mattresses of plaintiffs?

A. No, sir.

Q. Or that the mattresses of defendants were the "Sanotuf" mattresses? A. No, sir.

Q. Have you anything to do with the sale of mattresses in your store? A. Well, partly, yes.

Q. Do you know anything about the representations [178] that have been made to the purchasing public regarding these mattresses of plaintiffs and defendants?

A. I have never talked it.

Q. You don't know anything about any such representations?

A. Nothing only the term used between the two, the "Sanotuf" and the Jonas mattress. As I under-

(Testimony of Walter O. Gaines.)

stand it, the Roberti mattress was called the "Sanotuf" and the Jonas mattress was called the "Tiednotuff" mattress.

Q. To your knowledge have any representations been made to purchasers of mattresses in your store that the "Tiednotuff" mattress, and the defendants' mattress, was the same as the "Sanotuf" or plaintiffs' mattress?

A. I can't say that I ever have, no.

Q. You know of no such representations?

A. No, sir.

Q. You gave no instructions that there should be any such? A. No, sir.

Mr. BLAKESLEE.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. You didn't make the first purchase that was made by The Broadway Department Store from Jonas & Sons, did you? A. I did not.

[179] Q. So you don't know anything about what representations were made at that time when you started buying the defendants' mattresses?

A. No, sir; I wasn't at hand at that time.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—Miss Green.

TESTIMONY OF MISS ELLA L. GREEN, FOR DEFENDANTS.

[180] Miss ELLA L. GREEN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Where do you reside, Miss Green?

A. In Los Angeles.

Q. And what is your occupation?

A. I am Assistant Secretary and Treasurer of The General Motors Finance Corporation.

Q. Were you ever associated with the firm of Roberti Brothers, mattress manufacturers?

A. Yes, sir.

Q. Do you know who comprises that firm?

A. Mr. August Roberti, Jr., and Mr. Edward Roberti.

Q. Are they present here in court?

A. Yes, sir.

Q. And when did you first become associated with the firm of Roberti Brothers?

A. I believe it was November 18th, 1908.

Q. And in what capacity?

A. Bookkeeper.

Q. When did you leave their employ?

A. About June 28th, 1914.

Q. During the time of your employment by Roberti [181] Brothers do you know of your own

(Testimony of Miss Ella L. Green.)

knowledge whether one William Rufus Daniel was employed by such firm?

A. Mr. Rufus Daniel was there.

Q. Is he present here in court? A. He is.

Q. Is he the same Mr. Daniel who testified here this morning? A. Yes.

Q. And do you know of your own knowledge what his position was with said firm?

A. Yes. When he first came there he was a mattress-maker and he afterwards was placed in the position of foreman in the Mattress Department.

Q. During the time that you were at the firm of Roberti Brothers did Mr. Daniel ever ask you for the name of any patent attorney? A. He did.

Q. And do you remember when?

A. Well, of course I do not remember the day or the date but Mr. Daniel left probably about a year before I did and this was some time prior to that.

Q. And do you remember the name of the patent attorney? A. I do.

Q. Who was it?

A. The first name was Hazard. I do not recall the last name. It was Hazard and somebody.

[182] Q. Did you have any other conversation at that time? A. Yes.

Q. Do you recall what it was? A. Yes.

Q. What was it?

Mr. GRAHAM.—I object to that, Your Honor, as hearsay.

(Testimony of Miss Ella L. Green.)

Mr. BLAKESLEE.—This is testimony as to disclosure and knowledge of invention pleaded as prior invention.

The COURT.—You may answer.

A. He came to the office and asked me to give him the name of a patent lawyer or attorney, and I told him I knew very little about such things but I would see what I could find. I turned to the classified part of the telephone directory and found several names there, and I said, "Well, this one seems probably to be about the best advertised."

Q. (By Mr. BROWN.) Do you recall any conversation with Mr. Daniel concerning any long fibre cotton?

A. Well, I don't recall exactly the conversation but I remember Mr. Daniel purchased some there.

Q. How do you happen to remember that?

A. Well, they didn't handle a very great quantity of the long fibre white cotton and I was sort of provoked to think that one of the employees bought of it instead of saving it for some of our customers.

Q. Do you of your own knowledge know whether or not [183] he ever applied for any patent for mattresses?

A. Just how do you mean it? He did not tell me what he wanted with this firm.

Q. Did he ever show you any drawing or anything?

Mr. GRAHAM.—That is objected to as leading. Let the witness tell everything that took place.

The COURT.—She may answer.

(Testimony of Miss Ella L. Green.)

Mr. GRAHAM.—Note an exception, please.

A. Afterwards he brought some papers to the office, patent papers I suppose you would call them.

Q. (By Mr. BROWN.) Was there any drawing?

Mr. GRAHAM.—I move to strike the last part of the witness' answer.

The COURT.—It may be stricken as to what she supposed they might be called.

Q. (By Mr. BROWN.) Was there any drawing?

Mr. GRAHAM.—I object to the leading questions, your Honor. Let the witness describe what these papers were.

The COURT.—Yes. Tell what you saw in the papers.

A. They were blue-prints.

Q. (By the COURT.) Blue-prints of what? Could you tell?

A. Of some application for a patent.

Q. On what kind of an apparatus, if anything, if you could tell? A. Some kind of a mattress.

Q. (By Mr. BROWN.) At this occasion was anyone else [184] present? A. Yes, sir.

Q. Who? A. Mr. August Roberti.

Mr. GRAHAM.—Just a minute; it has not been shown where this conversation took place.

Q. (By Mr. BROWN.) Where did this conversation take place? A. In the office.

Q. Of what? A. Of their establishment.

(Testimony of Miss Ella L. Green.)

Q. Of the Roberti Brothers' establishment?

A. Yes, sir.

Q. Was anyone else present? A. Yes.

Q. Who?

A. The assistant bookkeeper and probably one or two others.

Q. Who were the others? Do you recall?

A. I think Mr. Clark.

Q. Who was the assistant bookkeeper?

A. Minerva J. English.

Q. When was all this? Do you recall any date?

A. No.

Q. Or year, either?

A. No, but it was before Mr. Daniel left there.

[185] Q. Do you think that you could describe the drawing that you saw at that time?

A. Not in detail.

Q. Do you think you would remember it if you saw it?

A. I might remember something of it.

Q. I show you here a drawing, and will ask you if you recall or know anything concerning it, being Defendants' Exhibit "T"?

A. There are parts of it which seem familiar.

Q. What parts?

A. This part down here in figure 5.

Q. Do you note any difference between that which you saw at that time and the drawing there?

A. No; I couldn't say as to that.

Q. What do you remember about the drawing that you saw?

(Testimony of Miss Ella L. Green.)

A. Well, I remember that I saw the name "Hazard" at the bottom, and remarked something about his going to the parties that I selected.

Q. Who did you say was present on this occasion?

A. Mr. August Roberti and Mrs. Minerva J. English. I remember those two.

Q. Do you remember whether or not August Roberti was near Mr. Daniel at the time he was explaining his device?

A. Well, I remember he was near the drawing.

[186] Q. Where were Mr. Daniel and Mr. Roberti? A. In the office at the desk.

Q. At whose desk?

A. Well, there were two desks in the office.

Q. And he was at one of them?

A. Well, I never called it exactly my desk.

Q. Did you see Mr. Roberti looking at the drawing? A. I did.

Q. How do you happen to remember that?

A. Well, I recall his black head bent over the drawing.

Q. Did he look at the papers, do you recall, the application papers? A. I think he did.

Q. Do you recall whether or not Mr. Daniel had a model of a mattress at that time? A. I do not.

Q. Do you recall any conversation that Mr. Daniel might have had concerning his device to you directly at that time?

Mr. GRAHAM.—I object to that question as asking for a conversation that he might have had.

(Testimony of Miss Ella L. Green.)

If the witness can remember any conversation that took place let her state that.

The COURT.—She is asked if she recalls any. Do you? A. Will you please repeat the question?

Mr. BROWN.—Please read the question, Mr. Reporter.

(Question read.)

[187] The COURT.—That he did have. Do you recall any conversation that he did have?

A. Well, the remark was made something about "Now you see what I wanted with the white cotton; I wanted it for my model."

Q. (By Mr. BROWN.) Who made that remark?

A. Mr. Daniel; something to that effect. I couldn't quote his words, of course.

Q. Do you recall any further conversation of that time that you heard? A. I believe not.

Mr. BROWN.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. Who was it that had the black head bending over the desk? A. Mr. August Roberti.

Q. Both Mr. Robertis have black heads, haven't they?

A. Yes, but Mr. August Roberti is shorter than I am and I always sort of looked down on his black head.

Q. Wasn't he sitting down at the time at the desk? A. Oh, no; he was standing.

Q. And this conversation took place in the office. What do you mean by "in the office"?

(Testimony of Miss Ella L. Green.)

A. In the part of their factory where the office work [188] was conducted.

Q. That is Mr. Roberti's office?

A. The office of Roberti & Brothers.

Q. Well, wasn't there more than one room there?

A. There was more than one room but there wasn't more than one office room at that time.

Q. Who occupied that office or that room?

A. During the working hours the office force.

Q. They were all in there together; is that correct? A. The office force was there together?

Q. Yes. A. Oh, yes; it was just a small force.

Q. Where were you at the time of this conversation? A. I was in the office.

Q. How far were you away from the desk when this was being talked about? A. Not far.

Q. Well, how far?

A. I couldn't tell you how many feet.

Q. Who else was in the room?

A. Mr. August Roberti, Mr. Daniel and Mrs. Minerva J. English.

Q. Was there any other worker in that room of the office force?

A. The office force consisted of myself and Mrs. English at that time.

[189] Q. How large a room was that?

A. I never measured it.

Q. Can't you give an idea how large it was?

A. A small room.

Q. What do you mean by "a small room"?

(Testimony of Miss Ella L. Green.)

A. Well, I should say it wasn't more than twelve or fifteen feet square.

Q. And had how many desks in there?

A. There were two.

Q. The drawing or blue-prints shown you by counsel, when did you see that last before you came into the courtroom?

A. I saw it about a week ago.

Q. Who showed it to you? A. Mr. Brown.

Q. Mr. Brown? A. Yes.

Q. You had a conversation with Mr. Brown at that time about the blue-prints?

A. He asked me if I had ever seen it.

Q. And what did you say?

A. I said I thought I had.

Q. You weren't sure about it, were you?

A. Well, I couldn't swear it was the identical copy, and I told him so.

Q. And you can't swear it now?

A. I could not.

[190] Q. Would you swear positively that those papers that Mr. Brown handed you are the papers that were shown to Mr. Roberti?

A. I could not swear that.

Mr. GRAHAM.—That is all.

Redirect Examination.

(By Mr. BROWN.)

Q. Miss Green, did you ever before this morning see the blue-print or copy there of Exhibit "T"?

A. Well, I couldn't swear I have seen this one.

Q. Is that the one that I showed you a week ago?

(Testimony of Edmund A. Strause.)

A. I have seen one similar. I have no way of identifying it as the exact copy.

Mr. BROWN.—That is all.

(Defendants rest.)

Mr. GRAHAM.—Mr. Strause, will you take the stand?

TESTIMONY OF EDMUND A. STRAUSE, FOR PLAINTIFFS (IN REBUTTAL).

[191] EDMUND A. STRAUSE, a witness called on behalf of the plaintiffs, in rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Mr. Strause, what is your business?

A. Patent attorney.

Q. How long have you been a patent attorney?

A. Quite a number of years.

Q. Were you a patent attorney in 1910?

A. Yes.

Q. And where were you located in 1913 and 1914 and 1915?

A. In the Wesley Roberts Building at the corner of 3rd and Main, Los Angeles.

Q. Do you remember a client by the name of William R. Daniel? A. Only by name.

Q. Do you have the files—or did he ever make an application for patent through you? A. He did.

Q. Have you the file of that application?

A. I have.

(Testimony of Edmund A. Strause.)

Q. Is there any correspondence in that file with Mr. [192] Daniel, either letters received from him or letters sent to him? A. Yes, sir.

Q. Will you please produce those letters, or copies of them?

A. Here are the letters I have in my hand.

Q. What is the first letter that you have there? What is it dated?

A. It is a letter dated September 13th, 1913, and addressed to Mr. William R. Daniel, care of H. W. Smith, 1338 East 15th Street, City, Los Angeles.

Q. Was the original of that letter sent to the address and properly mailed? A. I imagine so.

Q. Are you positive of it?

A. As far as I know.

Q. This letter reads: "Dear Sir:—"

Mr. BLAKESLEE.—Wait; we object unless the foundation is laid. There has been no testimony as to whether this witness knows by whom the letter was written or mailed or anything about it. We don't even know whether he is custodian of the file or where the file has been, or anything else about it.

Q. (By Mr. GRAHAM.) Where has this file been, Mr. Strause, since 1913?

A. It has been filed away in connection with other [193] matters that were prosecuted by the firm of Hazard & Strause.

Q. And has been in your possession all that time?

A. It has been in my possession since that time.

Q. I will ask you to look at that letter—

(Testimony of Edmund A. Strause.)

Mr. BLAKESLEE.—We further object that no foundation is laid. The witness hasn't testified that he had anything to do with this case personally. He was a member of a firm at the time, and may have had employees and it has not been connected up with any transaction concerning this case.

Q. (By the COURT.) Mr. Strause, did you handle the matter yourself?

A. I couldn't say, because I handled a large number of cases and naturally I wouldn't know unless I consulted the file as to whether I personally took the case in or not, but I remember the case very well.

Mr. BLAKESLEE.—May I ask the witness a question?

The COURT.—Yes.

Q. (By Mr. BLAKESLEE.) You had a partner at the time, didn't you? A. Yes, sir.

Q. And employees? A. Yes, sir.

Q. And you don't know whether you personally handled this case or these letters, do you?

[194] A. Well, I could see here in just a moment. Personally I didn't take the case. One of our employees did.

Q. You didn't prepare the application, did you?

A. That I couldn't remember.

Q. You don't know that you prosecuted it personally, do you? A. No; I did not.

Q. You have no knowledge of any of the contents of that file, personally, have you? A. Oh, yes.

Q. Excepting that it is a file of the then firm,

(Testimony of Edmund A. Strause.)

you have no knowledge of any transaction in there personally, have you?

A. No; I couldn't say that I absolutely have.

Mr. BLAKESLEE.—We object because no foundation has been laid. There must be some witness they could call who had knowledge of this transaction.

Q. (By Mr. GRAHAM.) I call your attention to a letter dated "San Francisco, California, Feb. 17–04," addressed to Hazard & Strause. Of your own knowledge was that letter received by your firm?

Mr. BLAKESLEE.—We object because no proper foundation has been laid.

A. It was.

The COURT.—He is presumably testifying to what he knows of his own knowledge.

[195] A. Yes.

The COURT.—He says he is.

Q. (By Mr. GRAHAM.) That letter is signed what? A. W. R. Daniel.

Q. And what does that letter state?

A. "San Francisco, California, Feb. 17–04.

Hazard & Strause.

Dear Sirs:

Please inform me at your earliest convenience what action the Patent Office have taken in regards to my application for Patent Mattress.

W. R. DANIEL.

712 Shotwell St., San Francisco."

(Testimony of Edmund A. Strause.)

Q. Does your file show that any response was made to that letter?

A. It does; I personally responded to the letter.

Mr. BLAKESLEE.—The same objection to all of this.

The COURT.—Yes, and overruled.

Q. (By Mr. GRAHAM.) You personally wrote the response to that letter? A. I did.

Q. Have you a copy of this personal response that you made to that letter? A. I have.

Q. What is that dated?

[196] A. February 18, 1914, addressed to William R. Daniel, 712 Shotwell Street, San Francisco, California.

Q. I call your attention to these initials, "EAS" in the corner. What does that mean?

A. That represents my initials.

Q. And that letter reads in what manner?

A. "Dear Sir:—

Your favor of the 17th received. The Examiner in charge of your application has again rejected same on a newly discovered reference, and we will again amend same and endeavor to point out the differences. As soon as we hear anything definite, we will notify you.

Yours very truly."

Q. Did you receive any other letters from Mr. Daniel?

A. One other letter from San Francisco.

Q. What is the date of that letter?

A. May 3d, 1915.

(Testimony of Edmund A. Strause.)

Q. What is the signature to that letter?

A. W. R. Daniel.

Q. And what does that letter state?

A. "Dear Sirs:

As I have not heard from you in regards to my application for patent on mattress since September 12th, 1913, would be pleased to hear [197] from you in regard to same.

Respectfully."

Q. Is there any response in your files to that communication? A. Yes, sir.

Q. Will you please refer to that? Did you write the response personally? A. I did.

Q. And what does that state?

A. "May 5th, 1915.

Mr. W. R. Daniel,
1277 Howard Street,
San Francisco, Cal.

Dear Sir:

Your favor of May 3d received. The Examiner in charge of your application has repeatedly rejected the same on patents, domestic and foreign, which apparently clearly anticipate your invention. In his last action the Examiner stated:

> 'That the claims are rejected on the references of record in view of the modification shown in figure 4 of Busche.'

These references being herewith enclosed. As far as we can determine, the references apparently anticipate your invention, and on August 14th, 1914,

(Testimony of Edmund A. Strause.)

we wrote to Mr. H. W. Smith of 1338 East 15th [198] Street, to call relative to the same; all communications being directed to him at your request, yet Mr. Smith did not call, and thinking that you had lost interest in the matter, as well as Mr. Smith, the application became abandoned by reason of non-prosecution. If you still think that your device is patentable over the references of record, your only remedy will be to file a new application, which will cost you $30.00.

Kindly let me hear from you relative to this matter at your earliest convenience, returning the references to me.

Yours very truly."

Q. Did you ever have any response to that letter?

A. No response and no return of the references.

Q. Were these letters sent in the ordinary course of business from your office? A. Yes, sir.

Q. Were they sent through the mail, properly addressed? A. They were, by clerks.

Q. And they weren't returned to your office?

A. No, sir.

Q. And these letters written to Mr. Daniel were dictated and written personally by you?

[199] A. They were.

Q. Is that correct? A. That is true.

Mr. GRAHAM.—We offer these letters in evidence, embracing two letters from Mr. Daniel read by the witness, the letter of February 18th and the letter of August 14th, 1914, and a letter of May 15th, 1915, as one exhibit.

(Testimony of Edmund A. Strause.)

The CLERK.—Plaintiffs' Exhibit 6.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—We object to the offer on each of the grounds of the objection, excepting that those letters are copies of letters which the witness says he personally wrote, and further object on the ground that the correspondence has not been connected up with the particular application in question here, there being no showing that it pertains to the same application or subject matter.

Q. (By Mr. GRAHAM.) Did Mr. Daniel ever have another application in your office, Mr. Strause?

A. No, sir.

Q. And can you state from your records to what application these letters refer?

A. To an application on a mattress construction.

Q. Have you a print of that construction?

A. I have, yes, sir; I have a blue-print of the drawing.

[200] Q. Will you produce it?

(Witness produces same.)

Q. And this is a blue-print of the drawing of the application to which this correspondence which you have read relates?

A. Yes, sir. That is a correct copy of the drawing as filed in the Patent Office that accompanied the application.

Mr. GRAHAM.—We also offer in evidence this blue-print produced by the witness, as part of the previous exhibit. With respect to that portion of Mr. Blakeslee's objection referring to the letter not

(Testimony of William R. Daniel.)

being written by Mr. Strause, the letter not written by him is not placed with the exhibit.

The COURT.—The objection will be overruled unless there is a question as to Mr. Daniel's signature on the letters. I suppose technically they would have to prove that.

Mr. BROWN.—(After exhibiting letters to Mr. Daniel.) That is all right.

The COURT.—The objection will be overruled then.

Mr. GRAHAM.—That is all, Mr. Strause.

Mr. BLAKESLEE.—No questions.

Mr. BROWN.—Mr. Daniel, take the stand.

Mr. GRAHAM.—We have some other witnesses on rebuttal.

Mr. BLAKESLEE.—We would like to clear up this matter [201] first, if we may.

Mr. GRAHAM.—That is all right.

TESTIMONY OF WILLIAM R. DANIEL, FOR DEFENDANTS (RECALLED IN SURREBUTTAL).

[202] WILLIAM R. DANIEL, recalled by the defendants, in surrebuttal, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Mr. Daniel, I call your attention to a letter addressed to you at San Francisco, California, dated May 5, 1915, being Plaintiffs' Exhibit 6, and will ask you if you recall receiving such a letter?

(Testimony of William R. Daniel.)

A. No, sir.

Q. Do you now recollect after reading that letter of having received it?

A. No, sir; I never got a letter like that.

Q. You never did? A. I never did.

Mr. BROWN.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. After these letters, dated February 17—is that your signature to that letter? A. Yes, sir.

Q. And this is your signature to the letter dated May 3d? A. Yes, sir.

[203] Q. What was the last thing that you heard from Hazard & Strause?

A. Well, I can't tell you that; I don't know.

Q. You really can't say?

A. I can't say now but it was something about the patent being denied and that he would have to amend, the way he worded it. That is as near the substance as I can give you.

Q. Do you recall his sending you or you receiving copies of any other patents? A. No.

Q. Printed copies like this? A. No.

Q. Weren't they included with a letter that told you they would have to be amended? A. No.

Q. You don't ever remember of seeing those?

A. No.

Q. But you received the letter?

A. No, sir; I did not receive that letter.

Q. Will you look at these carbon copies of these letters? Which of those did you receive?

(Testimony of William R. Daniel.)

A. That one sounds more like it. I couldn't swear that it was but that gives the substance of what I am trying to explain.

Mr. GRAHAM.—The witness referred to the letter of [204] February 18, 1914.

A. I didn't get anything that spoke of it in that way. It says: "Kindly let us know if you wish us to do anything further relative to the matter."

Mr. GRAHAM.—The witness is referring to the letter of August 14, from Hazard & Strause.

Q. That letter is addressed to Mr. Smith, is it?

A. To Mr. Smith, yes.

Q. And Mr. Smith was acting in your behalf in this connection, was he not? A. Yes, sir.

Q. And whether or not Mr. Smith sent that to you, you don't recall?

A. I don't recall, no, sir, but I don't think he did because I don't remember anything like that in any correspondence I have had.

Q. After that letter of May 3d, 1915, did you ever write to Hazard & Strause again?

A. I don't remember.

Q. You don't remember whether you made any inquiries about your application after that date?

A. No, sir, I do not.

Mr. GRAHAM.—That is all.

Redirect Examination.

(By Mr. BROWN.)

Q. Mr. Daniel, do you recall where you were in 1915, [205] in the early part?

(Testimony of William R. Daniel.)

A. I was in Napa, California.

Q. Napa? A. Yes, sir.

Q. Were you in San Francisco that year?

A. I was there in the fall. I think I came there in September.

Q. Were you there in May, 1915?

A. No. I think I left in April to go to Napa.

Q. Where did you reside when you were in San Francisco?

A. Well, at different places. I think it was on Ninth, between Mission and Howard.

Q. Referring to this letter addressed to you in San Francisco at 1277 Howard Street, did you ever reside at that address?

A. I believe that was the address.

Q. And were you at 1277 Howard Street, San Francisco, in May of 1915?

A. I don't think I was.

Q. You think you were in Napa, California, then, do you? A. I think I was in Napa, yes, sir.

Q. Did you keep your patent attorneys, Hazard & Strause advised as to your change of address?

A. Through Mr. Smith, yes.

Mr. BROWN.—That is all.

Mr. GRAHAM.—That is all.

[206] Mr. BROWN.—That is all.

Mr. GRAHAM.—Mr. Kaufman, will you take the stand, please?

TESTIMONY OF JACOB D. KAUFMAN, FOR PLAINTIFFS (IN REBUTTAL).

[207] JACOB D. KAUFMAN, a witness called on behalf of the plaintiffs, in rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. What is your business, Mr. Kaufman, and where are you located?

A. Where am I located? Q. Yes.

A. At 5110 and 12 Moneta Avenue; furniture.

Q. General furniture business?

A. General furniture, stoves, rugs and so forth, and everything that goes with it; springs, mattresses, rugs and so forth.

Q. How long have you been in that business?

A. Somewheres in the neighborhood of about ten years; going on eleven years, I believe. I started in the year of 1913 in September.

Q. And where were you located when you first started in business? A. At 1023 South Broadway.

Q. How long were you there, if you remember?

A. I was there about four years.

Q. Did you ever have any dealings with Roberti Brothers [208] while you were located at that place on Broadway?

A. Yes; I bought my mattresses from Roberti. At that time I hadn't bought any from anyone else. I only handled his line.

(Testimony of Jacob D. Kaufman.)

Q. I show you a document, and I will ask you if you recognize this signature, "J. D. Kaufman"?

A. Yes; that is my signature.

Q. And I call your attention to a certain writing above your signature. Does that tell you anything? What does that mean to you?

A. It says: 1 35# Restmore, Roll Edge, Can't Stretch—C. S.

Q. Does that refer to some kind of furniture?

A. No; that is a mattress. That is a thirty-five pound mattress, a Restmore.

Q. You used the words "Can't Stretch." What is there on there that indicates that?

A. If I remember right at that time—I guess that was the first time that I had ever handled that mattress. They introduced that mattress.

Q. What mattress do you refer to?

A. They call it the "Sanotuf" now.

Q. Is that the same mattress—

A. It is the same mattress only, if I remember right, Mr. Ed. Roberti waited on me himself that time.

Q. How do you identify that as what you have called a [209] Can't Stretch mattress?

A. Well, that is the way they billed it, "C. S." You see, when I used to receive the ordinary mattresses it was just a felted mattress or a cotton mattress, as it was called.

Q. When did you place your signature on that document?

(Testimony of Jacob D. Kaufman.)

A. Well, it is supposed to be the date of the invoice, when it was delivered to me.

Q. The date that the mattress was delivered to you? A. That it was delivered to me.

Q. And this is an invoice for that mattress?

A. That is the invoice, yes.

Q. And what is the date appearing on that invoice? A. It is "10/29/14."

Q. And whose invoice is that? A. It is mine.

Q. And who was the mattress received from, or does it show on that invoice?

A. From Roberti Brothers.

Q. And that was a Can't Stretch mattress, so called at that time, which is the same as the "Sanotuf" now? A. The same as the "Sanotuf" now.

Q. Have you ever bought other mattresses from them?

A. Yes, sir. I bought the common mattresses, the cheap mattresses.

Q. The common tufted mattresses?

[210] A. Yes, sir.

Q. I call your attention to your name written apparently in blue pencil, and call your attention to either purple or black initials written over that. Can you explain what that is?

A. Well, it seems like the bill originally was made to D. L. Kaufman, that is, they delivered to him I guess by mistake, and the mattress was meant for me, and he probably had refused the mattress and then I changed the initials on there so that I would carry the invoice on my book at

(Testimony of Jacob D. Kaufman.)

that time and I put a "J" and put a "D" next to that. The "L" still shows on there.

Q. Is that in your handwriting, the "J. D"?

A. The "J. D." is in my handwriting. The rest is not.

Q. And did you receive that mattress at that time?

A. I must have or I wouldn't have signed for it.

Mr. GRAHAM.—We offer this in evidence as Plaintiffs' Exhibit No. 7.

Mr. BLAKESLEE.—We don't see wherein this is rebuttal in any respect, or its relevancy or materiality or competency.

The COURT.—It is a question of dates, I suppose.

Mr. GRAHAM.—It is a question of dates and invention, your Honor.

The COURT.—Objection overruled.

Mr. GRAHAM.—That is all.

[211] Mr. BLAKESLEE.—The further objection is made for the record that neither the paper nor the testimony of the witness disclose any construction or describe the construction of any mattress, so that it would be irrelevant for the purpose offered.

The COURT.—He said it was the same as the "Sanotuf" mattress now made.

Mr. BLAKESLEE.—That of course didn't go to construction interiorly at all.

The COURT.—Then we had better find out about that.

(Testimony of Jacob D. Kaufman.)

Mr. BLAKESLEE.—Yes.

The COURT.—I take it that it covers it unless it is shown by his examination to the contrary.

Cross-examination.

(By Mr. BROWN.)

Q. Mr. Kaufman, do you know anything concerning the interior construction of a "Sanotuf" mattress?

A. Well, I don't know any more than the way I see it, that is, with the eyelets on top and the label. You usually show the customer what the label says regarding the construction of the mattress.

Q. Can you describe the construction of a "Sanotuf" mattress?

A. No, I cannot. The only thing I do is when I show the mattress I simply explain to them that it [212] has ventilation eyelets, and that the factory stands back of them with their guarantee.

Q. But as to its construction you know nothing of it? A. No, sir.

Mr. BLAKESLEE.—We repeat the objection as to the materiality and relevancy.

Q. (By the COURT.) Outside of the exterior and the eyelet and the appearance of it, is there any difference between the "Sanotuf" mattress displayed here and the one you say you bought under that invoice? A. About the same.

Q. But inside of it you have not looked?

A. I haven't seen it.

(Testimony of Edward Roberti.)

The COURT.—I will allow it to remain as a circumstance. Of course it is not complete.

Mr. GRAHAM.—I expect to tie it up further, your Honor, by another witness. That is all.

Mr. BROWN.—If the Court please, I had certain depositions taken in the East regarding certain acts of unfair competition and violation of trademark, and according to Equity Rule No. 55 a deposition is deemed published when filed, and they are now on file. Will this court also deem that the depositions have been read?

The COURT.—If that is agreed.

Mr. GRAHAM.—We will waive any claim as regards the Restmore, your Honor. It may be filed, if you want to [213] put it in the record.

Mr. BLAKESLEE.—They are stipulated then to be offered and deemed read, and may be used for any purpose for which we may wish to use them?

Mr. GRAHAM.—That is satisfactory. Mr. Edward Roberti, take the stand.

TESTIMONY OF EDWARD ROBERTI, FOR PLAINTIFFS (RECALLED IN REBUTTAL).

[214] EDWARD ROBERTI, one of the plaintiffs herein, called on behalf of the plaintiffs, having been previously duly sworn, testified as follows in *sur*rebuttal:

(Testimony of Edward Roberti.)

Direct Examination.

(By Mr. GRAHAM.)

Q. I show you what purports to be an invoice. Would you please state fully what that is?

A. That is a duplicate invoice which we send with the driver that delivers our merchandise, to receive a signature for the receipt of merchandise.

Q. And that date "11/29/14," what does that refer to? A. "10/29/14" it is.

Q. Yes.

A. That is October 29, 1914.

Q. What has that date to do with the invoice?

A. That is the time of delivery of this merchandise.

Q. And in 1914 in your regular course of business were you making a duplicate invoice such as you have in your hand? A. Yes.

Q. Which was signed by the person to whom the goods were delivered? A. Yes, sir.

Q. Where did you obtain that particular invoice?

[215] A. From our files.

Q. And it has been in your files all the time since 1914? A. Yes, sir.

Q. Will you refer to the description of the mattress on there and explain that to us?

A. One 35# Restmore Roll-Edge Can't Stretch 141 Tick, 4 foot and 5 inches, $4.65.

Q. You said "Can't Stretch." Does it say "Can't Stretch" on that invoice?

A. No. That is an abbreviation the same as

(Testimony of Edward Roberti.)

"R. M." is for Restmore and "RE" is for Roll-Edge.

Q. What is the abbreviation of that invoice for "Can't Stretch"? A. "CS."

Q. Do you know what the construction of that mattress was?

A. That was the same mattress as we are manufacturing now. I call it the "Sanotuf."

Q. Was it the same exterior and interior construction? A. Yes, sir.

Q. That is, it had the eyelets? A. Yes, sir.

Q. And ties? A. Yes, sir.

Mr. BLAKESLEE.—We think the witness should describe it [216] without being led.

Mr. GRAHAM.—He has described the "Sanotuf" mattress.

Q. Will you describe the construction of that particular mattress, Mr. Roberti?

The COURT.—Let him make a general answer. First, was it the same as this construction of this mattress which you exhibited here?

A. It is the same construction as we are making to-day, called the "Sanotuf" mattress.

Q. In every particular?

A. In every particular.

Q. Especially as to its interior connections and construction? A. Yes.

The COURT.—I will permit cross-examination to determine any difference.

Q. (By Mr. GRAHAM.) Mr. Roberti, had you made any other mattresses at that time having the

(Testimony of Edward Roberti.)

same construction as what has been offered in evidence here as "Sanotuf" mattress?

A. Yes; we made several more of them. We made them all during that month.

Q. During what month?

A. The month of October, 1914.

Q. Subsequent to that sale of October 29th, 1914, did you sell any other mattresses of the same construction? [217] A. Yes.

Q. How do you fix those dates?

A. By records.

Q. Have you those records here?

A. I have some. Do you want me to read them?

Q. Yes. What are those records, in the first place?

A. These are similar records to those I read before here to J. D. Kaufman, only to different firms.

Q. They are invoices for mattresses delivered by you or your firm?

A. A duplicate invoice or receipt invoice, with the customer's signature.

Q. Will you simply refer to the dates of those and to whom they were delivered.

A. N. B. Blackstone, November 16, 1914.

Q. What was the mattress delivered at that time to N. B. Blackstone?

A. That was one 30# Restmore, Roll Edge, Can't Stretch, 178 tick, 4 foot by 6 foot.

Q. Was that mattress of the same construction as the "Sanotuf" mattress that has been testified to here? A. Yes, sir.

(Testimony of Edward Roberti.)

Q. Have you any others?

A. November 10, 1914, O. E. Putty, San Pedro, California, One 30# Floss Mattress, which is termed Kapot now, Roll-Edge, Can't Stretch, 4/5 x6/3.

[218] Q. Was that mattress delivered at the time indicated on your invoice?

A. Yes, only we have no signature on this because it was a shipment. We can't get a signature on a shipment. It was out of town.

Q. Was that mattress on the invoice you have just referred to of November 10th of the same conconstruction as the "Sanotuf" mattress testified to here? A. The same construction, yes.

Q. Have you any others?

A. I have one here of November 5, 1914, to the South Pasadena Furniture Company, South Pasadena, and here is a numerous lot of other merchandise on the same bill. There is one 30# Restmore blue—well, that isn't it either. It says, "Two 30# Floss Roll-Edge Can't Stretch, $9.75 each."

Q. Is that the only article on there referring to the Can't Stretch mattress?

A. That is the only article on there referring to the Can't Stretch mattress.

Q. According to your records were those two mattresses mentioned on that invoice delivered at the time indicated thereon? A. Yes.

Q. Was the construction of those two mattresses the same as that which has been described as the "Sanotuf" [219] Mattress? A. Yes.

(Testimony of Edward Roberti.)

Q. Have you any other records?

A. That is all the invoices I have here.

Q. Were these invoices which you have just referred to kept in the regular course of business by the firm of Roberti Brothers? A. Yes, sir.

Mr. GRAHAM.—We offer in evidence these invoices.

Q. Where did you obtain these invoices?

A. From our files.

Q. And where have they been since they were made out in 1914? A. In our office.

Q. And they are such invoices as are kept in the regular course of business by your concern?

A. Yes, sir.

Q. And each of the mattresses referred to on these invoices as a Can't Stretch mattress, was that of the same construction as the "Sanotuf" mattress which we have in court and which is marked Plaintiffs' Exhibit 4? A. The same.

Mr. BLAKESLEE.—In this connection I would like to lay a foundation in connection with the offer and ask the witness if he had anything to do with the sale of these particular mattresses on these invoices.

[220] Q. Did you sell them personally?

A. I personally sold all of those.

The CLERK.—(Referring to the last exhibit offered.) Plaintiffs' Exhibit 8.

Q. (By Mr. GRAHAM.) Mr. Roberti, you testified, if I understood you correctly, that you had made some mattresses prior to the date on the first

(Testimony of Edward Roberti.)

one of these invoices, that is, October 29th, 1914. Is that correct? A. We made several of them.

Q. In other words, this first mattress which you sold was not the first mattress which you made?

A. No.

Q. Do you recollect when you first made a mattress which embodied all of the construction, that is, that was of the same construction as shown in Plaintiffs' Exhibit 4?

A. The first mattress that we made, a full-sized mattress, in anticipation of putting it on the market, that is, ready to use, was about the first week in October, 1914.

Q. That is the same month that this one was sold, is that correct?

A. The same month that this was sold.

Q. And prior to that time had anything been done toward making a mattress which was different from the ordinary tufted mattress?

[221] A. Yes; we worked on the mattress in a model form, making small models I would say 60 days before that time.

Q. When did you first get the complete idea of the mattress in its present form, or as shown in your patent?

A. I would say about the first week in October, 1914.

Q. Where did you first get your idea of making a mattress along this order, Mr. Roberti?

A. Why, when we first went in business, my brother and I, we did repair work, that is, reno-

(Testimony of Edward Roberti.)

vating mattresses, and we remembered of making over some mattresses which were brought here from Russia, filled with sheep's wool. The construction of the tick was different than ours but it had inside ties which were used in what they call a home method of making a mattress. They would just fill the mattress by hand a certain distance and then take the ties and tie them together to bring the mattress down to a uniform thickness. Then they would put some more filling in and take and tie those strings together at another interval and continue on until they got the mattress completely filled. I know when we made this mattress over for these people we asked them if they wanted them made the same way they were, or to use our method of tufting them on top, that is, our regular form of making mattresses, and we got their idea and in talking it over together we wondered why we couldn't conceive some idea of tying a mattress inside [222] and that is when we arrived at the idea of using the eyelet in the mattress.

Q. That idea of using the eyelet didn't come to you right away, did it?

A. Oh, no. When we were making mattresses at first like that we were just you might say in the retail work and we hadn't any idea of ever patenting a mattress at that time, but having that experience with these mattresses it learned us the idea of improving a mattress, or inventing a mattress.

Q. Reverting for a moment to the mattresses re-

(Testimony of Edward Roberti.)

ferred to in those invoices, do you know where any of those mattresses are at the present time?

A. No; I couldn't say.

Q. Mr. Roberti, how were the first "Sanotuf" mattresses made, that is, the mattresses which embodied the complete construction as shown by Plaintiffs' Exhibit 4?

A. They were made just the way they are made now.

Q. Well, were they made by hand or by machinery?

A. Our first models that we made and the first mattress that we made for several months were made with—or the eyelets were put in by hand.

Q. What do you mean by they "were put in by hand"?

A. Well, just the same as you would put a gromet in with a pair of tweezers like in a tent.

Q. Are you still putting them in with this hand punch, [223] or whatever you call it?

A. No. We have automatic eyelet machines now.

Q. When did you first have the automatic eyelet machines?

A. I have an invoice here from the United Shoe Machine Company on February 13, 1915.

Q. That date you have referred to, what connection has that with the power machine which you spoke of?

A. It says here: 1 Cameo foot power eyelet machine No. 331, race-way 16389.

(Testimony of Edward Roberti.)

Q. Did you receive that machine referred to and the document— A. We still have the machine.

Q. Prior to the receipt of that machine what had you done in the way of getting a machine of this kind?

A. We had communicated with everybody we could get in touch with in regard to some sort of an eyelet machine and I have a letter here of December 24, 1914, where we applied for a machine.

Q. Who did you make that application to?

A. To the United Shoe Machine Company, San Francisco, to their agents at San Francisco.

Q. Prior to the date of that letter in December, 1914, had you made any effort to get a power machine?

A. We were looking wherever we could. We had gone to several of the shoe finding companies on Los Angeles [224] Street to try to find out if there was any way of getting hold of an eyelet machine, and there didn't seem to be anybody in this city at that time that was using eyelet machines, so we thought they might give us an idea where to get them on account of being in touch with the shoe people, and we asked everyone that we came in contact with that we thought might give us some enlightenment on where to get such a machine.

Q. Did you continue making mattresses from the dates of those invoices in November, 1914, to the present time? A. Yes, sir.

(Testimony of Edward Roberti.)

Q. And you have made them in large quantities?

A. Yes, sir.

Q. Is there any other way that you can fix the date relating to when eyelets were first used in quantity by you for the so-called "Sanotuf" mattress?

A. Yes. I have an invoice here from Dolliver & Brothers, manufacturers of eyelets, with an agency in San Francisco.

Q. What is the date of that?

A. Well, I beg your pardon; it is not an invoice. It is a letter from them giving us a price on eyelets.

Q. In what quantities? A. In quantities.

Q. In what quantities, I say?

A. This says "We enclose sample card of Derby eyelets to prevent any mistake in color, No. 700 in blue."

[225] Q. Does that refer to the price on quantity, and if so, what quantities? Does that give a price?

A. It says 10,000 Derby Eyelets No. 700.

Q. Prior to that time how were you buying your eyelets? Or what is the date of that document you referred to?

A. This is dated January 21, 1915.

Q. Prior to that time how were you buying your eyelets?

A. We were buying them from the Los Angeles Saddle and Finding Company, I think is the name of the concern, on Los Angeles Street.

(Testimony of Edward Roberti.)

Q. Were you ever in the office of the Imperial Cotton Works? A. I have been.

Q. Do you recall where the Imperial Cotton Works was located at the time that you were there?

A. I think it was Fifteenth and Hooper Avenue.

Q. Do you remember the occasion of your visit or visits to the Imperial Cotton Works?

A. I don't recollect of ever being in their place but twice while they were there in business on Hooper Avenue.

Q. What was the purpose of your visits that you have just referred to?

A. It was for the purpose of purchasing some ticking.

Q. From the Imperial Cotton Works?

A. Yes.

[226] Q. Were you approached by any one to purchase this ticking?

A. I can't recall now whether it was a customer had picked out a sample of their ticking for us to make a mattress of their ticking or that they wanted to dispose of some ticking, but I know I was over there to see some ticking once.

Q. While you were there were you ever shown any mattresses? A. Not that I ever recall.

Q. Did Mr. Fox ever show you any mattresses?

A. Not that I ever recall.

Q. Have you ever seen a quilt or comforter that was made by the Imperial Cotton Works or Mr. Fox?

A. I saw some of Mr. Fox's—or the Imperial

(Testimony of Edward Roberti.)

Cotton Works' comforters in stores, but I don't remember of ever seeing one in their place.

Q. Do you recall Mr. Fox or anyone there showing you a mattress? A. No.

Q. You were here in the courtroom and heard the testimony of Mr. J. H. Jonas, did you not?

A. Yes, sir.

Q. And do you recall Mr. Jonas testified to seeing some models or samples of one of your mattresses in San Francisco in 1916?

[227] A. Yes, sir.

Q. Is that correct? A. Yes.

Q. Could you state of your own knowledge what the construction of those models or samples was, and what was the purpose of having models or samples up in San Francisco?

A. Mr. New of the New Company, or I think it was the New Company then—anyway Mr. New of a ticking house in Chicago—called on us to sell ticking and I was showing him our invention and he thought very well of it, and he says, "If you will give me a model to take along I will see if I can do you some good up North," and I gave him a small model to take up with him which was made identically with eyelets and tabs as we are making it today.

Q. Did, to your knowledge, any one else on your behalf have a model of that kind in San Francisco, or a model of any other kind of a mattress, made by you? A. No.

Q. Mr. Roberti, have you ever had any trouble or

(Testimony of Edward Roberti.)

heard of any complaints about your mattress becoming torn or untied?

A. We have had some complaints about the knots coming untied, which fasten the upper and lower tab on the inside of the mattress, due to the carelessness of the mattress-maker in not tying the knot properly, which we [228] have gradually overcome; but we never have had any other part of our mattress come apart.

Q. Have you had any trouble with the tabs tearing off? A. We never have.

Q. I call your attention to a large mattress, a full-sized mattress, lying there on the chairs. Is that one of your "Sanotuf" mattresses?

A. That is one of our regular mattresses, a "Sanotuf."

Q. Is that made exactly in accordance with the patent in suit? A. It is.

Q. Mr. Roberti, will you look at that mattress and describe to us the making of that mattress as regards the material used and the question of stretching of material after the mattress is finally made, and compare that with this mattress of defendants, marked Plaintiffs' Exhibit 3.

Mr. BLAKESLEE.—We can't see the object, your Honor, in going all over this again. There has been one of plaintiffs' mattresses compared with the defendants' mattresses. Now, they bring in another and I can't see where it is anything but an incumbrance to the record. It isn't said to be any different from Exhibit 4.

(Testimony of Edward Roberti.)

Mr. GRAHAM.—There has been evidence by defendants' witnesses regarding certain alleged defects in the [229] plaintiffs' mattresses. They have made comparisons of the two mattresses. This new mattress is simply referred to as being of such a size as will compare more directly with the mattress Plaintiffs' Exhibit 3 which has been offered in evidence. That is the only purpose.

The COURT.—He can make the comparison of the points resulting from the construction as between the two. I think that was done by Mr. Jonas.

Q. (By Mr. GRAHAM.) Proceed, Mr. Roberti.

A. This mattress, as I have stated before, is made from an upper and lower tick member and has a never-stretch strip sewed crosswise of the mattress and also fastening a tab at intervals under each eyelet on upper and lower member of the tick, and which eyelet receives the needle to tie upper and lower tabs together to get the uniform thickness of mattress. In putting our eyelets at different distances from this seam it enables us to make a mattress with different thicknesses. A thin mattress that is real thin we put our eyelet closer to the seam so that we don't take as long a bite on our tab, which enables us to draw the mattress closer together, that is, the two sides of the ticking closer together. For illustration, if we made a mattress 12 inches thick we would have to put this tab, or eyelet rather, two or three inches from that seam in order to gain the result, so that the mattress

(Testimony of Edward Roberti.)

would not be [230] sunken into the tab where it is tied down.

The COURT.—I understand that now.

A. We allow our mattress one inch of take-up in the width of a mattress, which we claim can never all come out, because we have eliminated the stretching of the ticking, as the biggest part of the stretch of a mattress is the result of the stretching of the ticking; and the tying of our mattress is so shallow that we do not take up any great amount of ticking in tufting our mattress down, only to the extent of this one inch. Now, in regard to the "Tiednotuff" mattress, I can't see any difference in the operation or construction to bring the same results. They have the upper and lower tick members the same as we have; they have the tabs on the sides. Instead of being sewed on one side of the eyelet they have it sewed to both sides of the eyelets. And they have the never-stretch strip going across the same as we have on the "Sanotuf" mattress; and they have got to tie this mattress down with a needle through the eyelet with the same operation that we do on the "Sanotuf" mattress. As far as the take-up in the mattress, or as far as spreading rather, I would say that our mattress would not spread as much as this mattress for the reason that their never-stretch strip going across is broken at intervals, in seven different places, which will allow the ticking to stretch in [231] those places, where ours will not.

(Testimony of Edward Roberti.)

Q. (By Mr. GRAHAM.) I call your attention to the tabs on the defendants' mattress, and will ask you whether or not a tab that is connected by a single row of stitching, and where the pull is on the row of stitching, such as shown in the defendants' mattress, is not more liable to tear off than the tab of plaintiffs' mattress in which the pull is against a whole row of stitching?

A. From a mechanical standpoint I would say that a tab sewed on, and the strain which comes on that tab that is pulled from the center of that tab and not from the edges, would hold a greater strain than anything sewed where you pull against the end of the stitching, and it is easier to tear something from the end than it is in the center where you haven't got a broken thread to start.

Mr. GRAHAM.—We offer this mattress referred to by the witness in evidence as Plaintiffs' Exhibit 9.

The COURT.—It may be considered in evidence. Any cross-examination, gentlemen?

Mr. BLAKESLEE.—Yes, your Honor.

[232] Cross-examination.

(By Mr. BLAKESLEE.)

Q. With regard to any visit to the Imperial Cotton Works and any conversation with Mr. Fox, are we to understand that Mr. Fox never did show you a mattress, or that you don't recollect seeing such a mattress?

A. To my recollection I never saw a mattress in his place outside of I might have gone into his

(Testimony of Edward Roberti.)

factory and might have seen some mattresses laying around, but my attention was never called to any particular mattress.

Q. And you feel so sure of that that you would say it was not called to your attention?

A. I would absolutely swear I didn't see any particular mattress of any particular construction in the Fox establishment.

Q. Prior to 1914 you had seen a mattress with eyelets in the tick, had you not? A. No.

Q. No such mattress? A. No.

Q. Had you ever seen a patent showing such a mattress with an eyelet? A. No.

Q. You had never seen a patent of a man named Avrill with an eyelet in the tick? A. No.

[233] Q. Did you consider that you or your brother, or both of you, were the first to put an eyelet in the tick of a mattress? A. No.

Q. Where did you get that idea?

A. I have seen eyelets for the purpose of ventilating the side of a mattress a good many years ago.

Q. Do you consider that the presence of an eyelet in the tick of a mattress will ventilate the mattress, that is, a number of them?

A. I do if the ticking is of a sufficient weight to hold more air than the lighter tick.

Q. The mattress has to be put under pressure, though, I suppose, and no ventilation takes place in the mattress without any pressure on it, does it?

A. Yes, it does.

Q. In your affidavit with your brother, being

(Testimony of Edward Roberti.)

your preliminary statement in the interference with Mr. Avrill, the affidavit dated the 8th of February, 1917, being part of Exhibit "E," you didn't refer to any model. Do you remember why you neglected to refer to that or mention it?

A. We mentioned the first mattress we made.

Q. You didn't mention any model in that affidavit? A. No.

Q. Did you tell your attorneys that you had made a [234] model? Did you tell them at that time?

A. No; I don't know as I did.

Q. What became of that model?

A. I don't know.

Mr. GRAHAM.—That is objected to as assuming a fact that is not shown in the record. I don't recall the witness testifying to having made any models. He simply said he worked on mattresses, but as to a particular definite model I don't recall any testimony.

Mr. BLAKESLEE.—Oh, yes; the record says so.

Mr. GRAHAM.—Oh, is that so?

The COURT.—It is now 12 o'clock, Gentlemen. We will take a recess until to-morrow morning at 10 o'clock.

(Whereupon an adjournment was had until 10 o'clock A. M., Thursday, February 7, 1924.)

(Testimony of Edward L. Roberti.)

[235] Los Angeles, California, Thursday, February 7, 1924, 10 A. M.

The COURT.—You may proceed, Gentlemen.

EDWARD L. ROBERTI, recalled.

Cross-examination (Resumed).

(By Mr. BLAKESLEE.)

Q. What was it, Mr. Roberti, that suggested to you the use of eyelets in a mattress?

A. For a permanent opening to connect the inside ties.

Q. Did anything that you knew of suggest that to you—any other use of eyelets?

A. Where we got the suggestion of eyelets was because they are commonly used in shoes and so on, and it naturally would come to a person's view and reason to use them.

Q. The eyelets in shoes often are devoid of any metal lining or eyelet device, are they not?

A. No; the first eyelets that were used were shoe eyelets.

Q. I mean often shoe eyelets have no metal in them at all but are just perforations in the leather; isn't that correct? A. Yes, they are.

[236] Q. They are called eyelets, are they not?

A. I don't know as they are.

Q. They serve just as effectively, don't they?

A. I guess they do.

Q. You would not anticipate any trouble, would you, in using mattress ticks with perforations in

(Testimony of Robert L. Roberti.)

them such as shown in the Daniel drawing even if there were no metal linings for the openings?

A. Yes.

Q. You could use them, could you not, without the metal linings? A. No.

Q. Why not?

A. Because the hole would close up.

Q. Well, it wouldn't require any particular magic to get the needle through at that point, would it, where the hole had been opened?

A. You would tear the cloth and leave a torn place in the mattress.

Q. After the cord has been passed through the eyelet isn't used any further, is it; it has no further utility? A. Yes.

Q. What is that?

A. So that the mattress could be renovated and made over in the same form in which it was originally [237] made.

Q. And do you think it would be injurious to the mattress to reopen that hole for the purpose of renovating after the mattress had been used for a while?

A. No one in making a mattress over would know how the mattress was made. Nothing on the outside would show how they tufted the mattress down.

Q. Not even if there had been a clearly defined opening formed there first?

A. I say, that hole would close up.

Q. Well, suppose an opening had been formed

(Testimony of Robert L. Roberti.)

by cutting out a part of the fabric; would it not stay there?

A. Then it would ravel out and become a tear in the mattress.

Q. Then you consider the eyelet is valuable as a metal device for preserving that opening?

A. And for ventilation also.

Q. Just the same as it has been of use in any textile or leather for keeping the formation of the hole? A. Yes.

Q. Then I understand you to say the eyelet is valuable for ventilation of the mattress?

A. Yes.

[238] Q. You do not have ventilation in your present mattress, do you? A. No.

Q. Exhibit 9 shows the openings closed by the fabric underneath, does it not? A. No.

Q. Why have you abandoned the ventilation of it?

A. I said no.

Q. Isn't there fabric under those eyelets?

A. No.

Q. What is it that closes the eyelet?

A. They are not closed.

Q. Well, there certainly is material under the eyelets?

A. That is the filling in the mattress.

Q. And that comes right up to the opening, does it? A. Yes.

Q. How far do you anticipate ventilation would proceed within the mattress with the filling coming up right to the opening of the eyelet?

(Testimony of Robert L. Roberti.)

A. It would penetrate the same distance that the heat from the body would go into the mattress.

Q. You think air would penetrate the same distance that heat would? A. I do.

[239] You have never made any tests of that, have you? A. Only from common sense.

Q. You think the air would penetrate the mattress filling, even if the filling same right up to the opening, do you? A. I do.

Q. Now was this eyelet suggestion yours or that of your brother?

A. We talked over the eyelet together and my brother made the suggestion of using a shoe eyelet.

Q. I suppose that suggestion was made after the suggestion of using the tabs and anchoring means for the tabs, was it not? A. Yes.

Q. Who made that suggestion? A. I did.

Q. You suggested the tabs and the anchoring means and your brother suggested the eyelets?

A. No, my brother suggested using shoe eyelets.

Q. Yes, I say, using an eyelet. Now when was it that these suggestions were merged together so as to produce this mattress? When did that occur? When were these suggestions made?

A. Well, some time off and on all during the

[240] first part of 1914 and up until we invented the mattress.

Q. Now you say when you invented the mattress. When did you consider that invention was complete?

A. Do you mean when the patent was issued?

(Testimony of Robert L. Roberti.)

Q. No, but when, to your idea, you had, with your brother, finished the invention so that it was an accomplished fact in your minds. In other words, when the idea had been worked out to consummation.

A. About the first week in October, 1914.

Q. Do you remember where these discussions with your brother took place?

A. They took place in the office and also in the workroom.

Q. What, if anything further, did you suggest toward this idea?

A. Well, neither one of us ever worked anything out alone; we always consulted one another, whatever we were doing, for the benefit of the business.

Q. Do you remember distinctly anything else that you contributed to this combination?

A. I feel as though I contributed as much as he did.

Q. Can you name any other features that you contributed?

A. I considered it a joint invention on account [241] of us both getting it up.

Q. Well, of course that is a question of fact to be determined; but what I am trying to get at is what it was that you did or contributed toward this joint invention. Have you in mind anything further that you suggested?

A. I couldn't recall just the words that I suggested now, because we would, you might say, argue this thing back and forth at any suggestion either

(Testimony of Robert L. Roberti.)

one of us made from the sales standpoint and the feasibility of manufacturing.

Q. Who suggested the use of the strips running across the inner surfaces of the tick members and secured to the tick members?

A. That I don't know, which one of us did.

Q. You don't remember?

A. All I can remember is that our object was also to get a never-stretch mattress, and that was the feasible way of obtaining that result.

Q. Who was it suggested the passing of the twine through one tick at its eyelet and through the tab and down through the other tab and out through the other eyelet and back again and knotting the twine to draw the tabs toward each other?

A. I don't recall. That is a natural condition of mattress making that has to be done in order [242] to complete the mattress.

Q. Well, you considered that was a new operation with you and your brother, did you not?

A. On the outside it is.

Q. You considered that was a new method of assembling a mattress, did you not?

A. Yes. That is the way we were doing it.

Q. Who first made the suggestion of this method of procedure?

A. I can't remember that now.

Q. You consider that really as the backbone of the invention, don't you? A. Yes.

Q. That method. And you don't remember who suggested it?

(Testimony of Robert L. Roberti.)

A. I don't remember who first suggested it.

Q. Now you say all of these suggestions and this cross-fire of conference on this matter took place at your office or in your workrooms? A. No.

Q. At what other places did you discuss this matter?

A. I worked on it at home, and so did my brother.

Q. Did you consult anybody else in these matters?

A. Not while we were first experimenting.

[243] Q. Did you consult Mr. Scanlon?

A. After we had it up to the point where we have it to-day.

Q. During the working out of this invention did you or your brother make any sketches of the parts and features as you developed them?

A. Did we personally make any sketches?

Q. Yes. A. I don't remember that I ever did.

Q. Do you know of any that your brother made?

A. No. I don't know.

Q. During this period of some months while you developed this idea, to your recollection no record was made of the various suggested steps by producing sketches of the same?

A. We would probably make a drawing in our argument of the different ways of making it—make our drawings while we were sitting at a desk, of the contemplated method of making it, but we never made any original blue-prints or drawings ourselves.

Q. Do you remember making any such fragmentary sketches?

(Testimony of Robert L. Roberti.)

A. A good many times, yes. That would be our only procedure of showing one another just how it was to be done.

Q. Well, you do remember making them?

[244] A. Yes.

Q. Did you make them and your brother also?

A. Yes.

Q. Do you know what became of them?

A. No.

Q. Have you made any attempt to find them?

A. No; they would probably be thrown in the waste basket.

Q. You don't recollect what became of them?

A. No.

Q. You made no complete drawing of the device before you made the first mattress? A. No.

Q. During the year 1914 you made various kinds of mattresses which were called "Restamore," did you not?

A. No, not various kinds that were called "Restmore." That was the name of a filling which we used in a mattress.

Q. You made a number of kinds of mattresses that you sold during that year? A. Yes.

Q. Are you quite positive that the mattresses referred to in these order copies in evidence here which you identified yesterday were mattresses like Exhibit 9 here? [245] A. I am.

Q. You have no memorandum other than those mere items on those bill copies to show what those mattresses were, have you? A. No, I have not.

(Testimony of Robert L. Roberti.)

Q. Those bill copies simply refresh your recollection, do they, that you sold certain mattresses to the customers indicated on those copies?

A. We naturally would go to our files to see if we couldn't get some concrete evidence of delivery.

Q. You didn't make out those bills yourself, did you, of which you have produced copies?

A. No; that is not my handwriting.

Q. There is nothing about those bills that gives you any clue as to the nature of the mattresses themselves, is there? A. Yes.

Q. What is that that appears on the bills that gives you such a clue?

A. The abbreviation on there of the character of the merchandise.

Q. In other words, simply the "CS" indication?

A. Yes.

Q. And that is the only thing that indicates to you the type of mattress? A. Yes.

[246] Q. Did you make any other mattress during 1914 that could be considered a can't-stretch mattress? A. No.

Q. Nothing that you sold as a can't-stretch mattress?

A. No. We never put anything else on the mattress. We worked on several other mattresses in regard to getting a never-stretch mattress up, before we got this idea, but we never put anything on the market.

Q. Now you had a fire at your place of business in the latter part of 1914, did you not?

(Testimony of Robert L. Roberti.)

A. I couldn't just recall. I think somewhere along there we had a fire, yes.

Q. And that necessitated your getting the assistance of us manufacturers to some extent, did it not? A. No.

Q. You didn't go to the Imperial Cotton Works for certain work or certain material after that fire?

A. I may have gone to buy some material, but no assistance.

Q. Well, I mean to help you out in the emergency after the fire.

A. I don't recall. I might have gone there to buy some material.

[247] Q. Didn't they do some work for you over there? A. I don't recall if they did.

Q. Well, you went there quite a number of times in connection with material or labor for your mattresses, didn't you, in 1914 and the first of 1915?

A. I don't recall going there for any assistance or—I might have gone there to buy some material, but I don't remember of going there any number of times.

Q. How many times would you say you went there?

A. I don't remember of ever being inside of the Imperial Cotton Works more than twice.

Q. What part of the Imperial Cotton Works place of business did you visit?

A. I was into the office, and I remember once of looking at his—going over his stock of ticking.

Q. Out in the shop?

(Testimony of Robert L. Roberti.)

A. No, it was not out in the shop.

Q. In a showroom?

A. No, it was out on the floor. I wouldn't consider it a showroom.

Q. Didn't you go into the showroom during those visits at that time?

A. I don't remember ever being in a showroom, and I don't remember of their ever having a showroom.

Q. Where was the plant located when you went [248] over there?

A. I think it is either Fifteenth or Sixteenth and Hooper Avenue. Just a few blocks from my place.

Q. Did the first mattresses that you put out have strips clear across the ticking—cross-strips?

A. The first mattresses we sold?

Q. Yes. A. Yes.

Q. And it had the tabs also? A. Yes.

Q. Do you use the tabs applied in the same way now? A. Yes.

Q. And the cross-strips? A. Yes.

Q. What changes have you made from the first mattresses of this kind?

A. In regulating the eyelet a certain distance from the seam that fastens the tab to the upper and lower members of the tick.

Q. Do you consider that it is necessary to place the eyelet at one side of the center of the cross-strip? A. I don't get that.

(Testimony of Robert L. Roberti.)

Q. Your patent shows the eyelets at the center of the cross-strips. Do you consider that a necessary [249] location of the eyelets?

A. Well, we have to place the eyelet a certain distance from the seam in order to regulate the depth in which we tuft our mattress.

Q. Suppose you put the eyelet squarely over the center of the cross-strip, would that be satisfactory? I hand you a copy of the patent (handing document to witness). A. You mean—

Q. Right in the longitudinal center of the cross-strip.

A. You mean this cross-strip here (indicating)?

Q. Yes.

A. No, it wouldn't make any difference to us if it was at the edge of that cross-strip or in the center.

Q. You consider there would be no benefit to be derived, as far as your invention might give such benefit, by locating the eyelet out of the longitudinal center of the cross-strip?

A. I don't see what difference it would make.

Q. Now if you put the eyelet directly over the seam it would not do, would it? A. No.

Q. You have referred to your novel method, as you consider it, of assembling the mattresses from the [250] outside. The assembling of a mattress by cording the parts together was, in itself, old, of course, was it not?

Mr. GRAHAM.—That is objected to as not calling for a specific construction, and also as calling

(Testimony of Robert L. Roberti.)

for a conclusion of the witness as to whether it was old or not.

The COURT.—If you are agreed as to what is meant by "cording" the witness may answer. Do you understand, Mr. Witness?

A. I don't understand what he means by cording.

Q. (By Mr. BLAKESLEE.) I mean the tying together of the mattress.

A. What we commonly term as tufting the mattress down?

Q. Yes, passing the tie or cord clear through the mattress. A. May I hear that question again?

Q. I will restate it: That procedure was old, was it not, in mattress building?

A. Yes, before my time.

Q. And it was old, was it not, to do that without using any outside tufts at all?

A. Not that I ever saw. We always used a tuft of some kind.

Q. Didn't it simply fasten to the tick without a [251] tuft?

A. I don't remember of anybody making a mattress that way.

Q. Didn't you refer in your direct examination to a Russian mattress that was tied together?

A. From the inside.

Q. How was that tied?

A. With a bow knot, so that it could be untied again.

Q. And there were two reaches or lengths of cord, were there not?

(Testimony of Robert L. Roberti.)

A. Yes; there was a cord fastened to the upper member and lower member, probably seven or eight inches long, each one; a string.

Q. (By the COURT.) Tied by hand from the inside?

A. Tied by hand from the inside.

Q. (By Mr. BLAKESLEE.) It was looped through the tick at the top and bottom?

A. No, it was not exposed at the top of the tick at all, or the bottom, either side.

Q. It was not sewed to the tick?

A. It was sewed to the tick with thread, but never appeared on the outside of the tick.

Q. And no tab was used? A. No.

Q. It simply drew the ticks toward each other?

[252] A. Yes, sir.

Q. Were those mattresses reinforced in any way where the twine was attached to the tick?

A. No.

Q. Is it not true that the upper eyelets in your mattresses of the never-stretch or "Sanotuf" type do pull out the tick at times?

A. What do you mean by the upper eyelets?

Q. Well, in the upper tick, on top of the mattress.

A. There is no difference between one side and the other of the mattress.

Q. Well, of course one side is made the top of the mattress on the bed.

A. No, there is no such thing as the top of the mattress.

(Testimony of Robert L. Roberti.)

Q. It is the top of the mattress when one side is placed on the springs of a bed.

A. It is reversible.

The COURT.—I understand it is reversible.

Q. (By Mr. BLAKESLEE.) Yes, but is it not true that one side of the mattress in use has the eyelets pull out at times?

A. We have had some trouble with an eyelet machine, sometimes, not being set right in order to crush this eyelet properly on a thin material, and [253] sometimes it didn't clinch perfectly and then the eyelet wouldn't hold good, which was on account of faulty workmanship, but when the thing is functioning right we never have any trouble.

Q. (By the COURT.) Is there any greater strain on that surface of the mattress which is the top than on the surface that is underneath, resting on whatever you have there?

A. You mean on the eyelets?

Q. Yes.

A. There is no strain on the eyelet whatsoever. That eyelet has no strain whatsoever on it.

Q. (By Mr. BLAKESLEE.) By the upper side of the mattress I meant the side that a body lies on on the bed. Is it not that side that the eyelets pull out of? A. No.

Q. Any more than the other side? A. No.

Q. Can you remember when it was that this method of assembling or tying together the mattress parts became developed in your mind or your

(Testimony of Robert L. Roberti.)

brother's as a complete performance or a complete method of assembling the mattress?

Mr. GRAHAM.—We object to that. I think the witness has testified to it.

[254] A. I think I answered that question.

Mr. BLAKESLEE.—No; he stated that he didn't know who suggested it, and I am asking him when that method came to completion in somebody's mind.

A. About the first week in October, 1914.

Q. That is when that method itself was first completed in somebody's mind? A. Yes.

Q. Do you know where that complete idea was first expressed by either you or your brother? Was it in the shop or in the office?

A. I couldn't say.

Q. Was anybody present when that was first discussed? A. No, I don't think so.

Q. In fact you have no definite recollection whether it was you or your brother that first suggested that method as a complete method, have you?

A. There are several methods in the manufacture; I don't know which one you refer to.

Q. The method of assembling by passing the twine down through one eyelet, through the tab, and through the other tab and eyelet, and back again and tying it with a slip-knot and concealing the knot inside.

A. This was not done in one or two days; it took several weeks to figure this out, and it is [255]

(Testimony of Robert L. Roberti.)

pretty hard to say just where we were at each particular time we talked this over.

Q. Well, you don't remember who it was made the final suggestion that completed that as a method of mattress making, do you? A. No.

Q. Now you say you always used the cross-strips under the tabs?

A. We may have experimented after we got our mattress up—we may have experimented in several ways to eliminate cost in production, and experimented to do it several ways, but we never put the mattress on the market only as it is made to-day.

Mr. BLAKESLEE.—That is all.

Redirect Examination.

(By Mr. GRAHAM.)

Q. Mr. Roberti, would the thickness of the mattress have anything to do with placing the eyelet or with respect to the place the eyelet is put with relation to this strip that runs across the mattress?

A. Do you mean the distance from the seam in which the tab is sewed on?

Q. Yes, whether it is placed in one edge or in the middle or near the seam. Does the thickness of the mattress have anything to do with that question? [256] A. Yes.

Q. (By the COURT.) The only real effect it would have would be to reduce the extension of your tab through the mattress, is it not? A. Yes.

Q. And nothing else? A. Exactly.

Q. In one case, if you had it real close to the

(Testimony of Robert L. Roberti.)

seam, you would have more cord through your mattress? A. Yes.

Q. And even though you had a thick mattress you might still do it with a very short tab, your idea being to have your tab extend through the mattress? A. Yes.

Q. And to keep it uniform? A. Yes.

Q. Is there any advantage in having a tab extend through the mattress, over the cord?

A. The tab in some kind of mattresses has a greater resistance of holding the filling from shifting than what the cord has.

Q. (By Mr. GRAHAM.) You mean that, the tab being of considerably more width than cord, it offers that much more resistance to the filling shifting? A. Yes.

Q. Now you spoke of the advantage of eyelets in [257] the case of renovating mattresses. Just what did you mean by that?

A. When a mattress becomes matted down and the filling needs renovating it is common procedure to make over a mattress, or to renovate it, to take the filling out and clean the filling and put it back in again.

Q. And in doing that, by means of the eyelets you not only have the exact place to put your needle, but you also know that the tabs are in proper place to be engaged for the purpose of making the ties again; is that correct? A. Yes, sir.

Mr. GRAHAM.—That is all.

Mr. BLAKESLEE.—That is all.

TESTIMONY OF AUGUST ROBERTI, FOR PLAINTIFFS (IN REBUTTAL).

[258] AUGUST ROBERTI, called as a witness on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Please state your name.

A. August Roberti.

Q. Are you one of the patentees of the patent in suit, Mr. Roberti? A. I am.

Mr. GRAHAM.—For the purpose of clarifying the record I want to ask a question:

Q. Had you prior to the time this suit was brought transferred any interest in the patent?

A. I had not.

Q. Were you present in the courtroom and did you hear the testimony of Mr. Daniel? A. I did.

Q. Is Mr. Daniel present in the courtroom?

A. Yes, sir.

Q. Mr. Daniel testified about showing you certain documents or models relating to a mattress. Will you please state fully what you know about that situation?

[259] A. I know nothing about it.

Q. Was Mr. Daniel employed by you?

A. He was.

Q. Did Mr. Daniel ever show you a so-called specification and blue-print of a mattress?

(Testimony of August Roberti.)

A. He never did.

Q. Did he show you a model?

A. He never did.

Q. Did he ever talk to you about any alleged invention that he had made?

A. He never did.

Q. I will ask you if you also heard the testimony of Mr. Fox of the Imperial Cotton Works relating to certain disclosures claimed to have been made or the showing of a mattress to Mr. Edward Roberti? A. Yes.

Q. Did you have any conversation with Mr. Fox regarding that matter? A. I did.

Q. When did that take place?

A. In the fore part of November in this last year.

Q. And what was the nature of that conversation and where did it take place?

A. Mr. Fox was at his home in Van Nuys, and I asked him if he could recall any mattress with [260] eyelets in that Mr. Avrill had produced while working in his employ. He said there was only one mattress that was produced to his knowledge in his plant and that was the one with eyelets for lacing the mattress down.

Q. But what did you understand by that?

A. That that mattress would have eyelets in, but was for the purpose of lacing the mattress down to a proper thickness with the lace and using it in that manner, so that the mattress could be pulled down to a laced form.

(Testimony of August Roberti.)

Q. And what was the occasion of that conversation? How did that happen to take place?

A. Previous to the calling of our case, which was to be, I believe, the 5th of December last, I intended to have Mr. Fox as a witness if necessary in the case, so I asked him in conversation if he could recall any mattress other than this one he mentioned, and he said no, there was no other mattress to his knowledge that was made in his place except the one with eyelets for lacing.

Q. Were you not directed by your attorney to get in touch with him? A. I was.

Q. Now will you please state fully all the circumstances that you can recall relating to the [261] making of this invention shown in the Roberti patent, starting with the earliest thought on the subject and continuing until the time of the completed mattress?

A. Well, my whole life's work has been in the mattress business, and I started in the mattress business when I was 14 years old, and my brother and I went into partnership in the business in 1901, or 1902, and I being the inside man in the factory and my brother the outside solicitor for business our whole attention was given to mattresses and to perfecting mattresses as we went along in the business. In running our business we always have done, up to the time we became quite large manufacturers, considerable repair work and had a chance to see and to solve the different methods in which mattresses have been made, and what could be done, and com-

(Testimony of August Roberti.)

ing in contact with this it was very easy for us to solve, if possible, a problem which of course had never been solved before, so as to make a mattress that was better than the one made before it, and in getting in repair mattresses from time to time now and then there would be one of these mattresses showing up for repair that was made with the inner ties, as a foreign-made mattress, such as Russian mattresses, which would be tied inside, and there were no strips, but only ties to tie the ticking down from the inside. [262] Well, we didn't think much about making an improvement of that kind, only it stuck in our minds until the time came, about 1912, when it became quite a rage in Los Angeles for each and every manufacturer to have something special in the way of a better mattress, and the Stockwell Company, being a competitor at that time, started to manufacture the never-stretch mattress, which took Los Angeles by storm and was all the rage, and of course it left us without anything as a main special mattress to feature; so from that time, from 1912 until we produced the "Sanotuf" mattress our mind was continually working on this mattress to produce a mattress which would be a never-stretch mattress and be better than the one that was already produced on the market. We claim that we have three redeeming features and special features on the "Sanotuf" mattress where other never-stretch mattresses only have one feature. The features are that the "Sanotuf" mattress is a sanitary mattress, disposing of

(Testimony of August Roberti.)

the outside tufts. That is the first feature. The next feature is to have the inside ties, doing away with the roughness on the outside of the mattress and to bring the mattress down to uniform thickness, without having an outside tie, and the only possible way to market this mattress and make it salable would be to have a finished article such as an [263] eyelet or some finished job which would pass the inspection of the best mattress users, and in trying to solve the problem of using shoes with eyelets in it came to our mind that eyelets would be the proper thing, because an eyelet in a mattress would not be a substance which would be felt by the body coming in contact with it, and also would furnish an opening to operate this inner tie and bring it down to uniform thickness. Then when my brother and I began to talk about the never-stretch we concluded to put the never-stretch strip across next to the eyelet so as to be able to operate through this strip. In that way the mattress, after making a few models and working at it evenings at home and in and out and at different times all along—as I say, anywhere from 1913 and 1914—and the longer we put off the production of this mattress the more we needed it as we needed a better mattress to put the feature in our line.

Q. And what did you call the first mattress that you made and sold like the mattress here in evidence, or like the "Sanotuf" mattress, Exhibit 9?

A. We had never given the mattress a thought as to name, the first ones we made, and we started out

(Testimony of August Roberti.)

with the name "Can't-stretch," as our competitors had a name "Never-Spread," and we thought a "Can't-Stretch" mattress would be a practical name to use, although [264] it was not a very desirable name, until we got the "Sanotuf" mattress. The "Sanotuf" name was really originated by my brother. He came to me with the name "Sanotuf" and asked me what I thought of the "Sanotuf" name instead of "Can't-Stretch," and after solving the meaning of "Sanotuf," it meant a sanitary tufted mattress, therefore we thought that would be the proper name to give the mattress and that it would fit the construction of the mattress better than any name we had ever thought of.

Q. How were the eyelets put in the first "Sanotuf" mattress?

A. When we first thought of the eyelets we talked it over and I said "I will try the eyelets, and I will purchase a machine, if possible"; so I visited the wholesale finding companies, and of course they sold shoe findings and that was the place to go for an eyelet machine, and I purchased a hand machine, which was the only one I could get, and some eyelets, and then we started to make our models and work out the eyelets and place the position of the eyelets to where the inner construction could be operated from.

Q. Can you fix the time when the first "Sanotuf" mattress was sold?

A. According to our records it was along about [265] the latter part of October, 1914.

(Testimony of August Roberti.)

Q. And had you made any complete mattresses prior to the time you sold this one?

A. If any, a few, prior to that time. That is, just samples.

Q. Since that time have you continued to make mattresses, and up to the present time?

A. We didn't have much production until we had ordered a large machine whereby the eyeletting could be done in an economical way so as to enable us to make the mattress at a price whereby it could be sold.

Mr. GRAHAM.—That is all.

Cross-examination.

(By Mr. BLAKESLEE.)

Q. How long was Mr. William Daniel in the employ of Roberti Brothers?

A. I believe two or three years. I couldn't say exactly.

Q. What period of time did that employment cover?

A. I believe he came with us in about 1909 or 1910, and left, I think, some time in 1913, or in that vicinity of time.

Q. And you had a bookkeeper named Miss Ella [266] Green? A. Yes.

Q. How long was she with you?

A. Several years. I know she was there at that time, at the time Mr. Daniel was there.

Q. And the assistant bookkeeper's name was what?

(Testimony of August Roberti.)

A. I don't just recall her name, but I recall that we had an assistant there; I think her maiden name was Kaylor.

Q. And was Mr. Clark in your employ at the same time?

A. I couldn't say without referring to my records.

Q. You don't remember the shipping clerk?

A. I remember Mr. Clark, but I couldn't say whether he was there at the time that Mr. Daniel was there or not.

Q. You heard the testimony of your brother this morning, did you not? A. I did.

Q. Do you remember his testimony that he could not remember who had made the final suggestion, whether you or he, as to this method of tying together mattresses to complete the method of performance in making the mattress? Have you any recollection *about.*

[267] A. I have some recollection of it, yes.

Q. What is your recollection?

A. I recollect that we had recalled seeing a mattress without a counter-sunk indentation for tufting, such as the Russian mattress, which had inner ties. Our only trouble then, when we figured on making a "Sanotuf" mattress, would be with the inner tie, but the next thing was to get at that inner tie after the mattress was filled ready for finishing. Then the idea came to put a permanent eyelet in to get at this inner tie to operate. Then we worked out the strip, which of course would necessarily have to

(Testimony of August Roberti.)

be there to keep the ticking from stretching in width.

Q. Who was it, you or your brother, first got this complete idea of running the needle with the twine through an eyelet in the top, through both tabs, through the other eyelet at the bottom, and back again through both tabs and out the first eyelet and then knotting and drawing the knot into the mattress?

A. Being a mattress-maker you would not have to even mention that, because you would know that in placing this eyelet there it would be there for the purpose of connecting with the needle to these tabs. That is the only reason it could be there, aside from the ventilation.

Q. As I understand you, you had never heard of [268] that method of tying together a mattress before you and your brother had worked it out; had you?

A. Well, we knew that any mattress that is stayed in any way would have to be anchored—the filling would have to be anchored in some way. The only way you could do would be to run your needle down through the mattress and to anchor your filling through this eyelet.

Q. Well, did anybody know that before you and your brother knew it, as far as you wish us to understand? A. I couldn't say.

Q. Didn't you consider that that was knowledge that was new on the part of yourself and your brother, that method of tying together a mattress?

(Testimony of August Roberti.)

A. I knew that the eyelet was— As soon as we discovered that the eyelet would give us a finished product, we knew then that we had something that was a *far* improvement over any mattress that had ever been produced.

Q. Did the thinking of the eyelet precede the thought of using the eyelet, or did the method of tying together the mattress precede the thought of using the eyelet?

A. The eyelet was the only obstacle as far as making the mattress is concerned. You see, that [269] enabled us to fill the mattress and also get at the inner operation of it after it was filled and sewed; therefore when we discovered the eyelet was the thing to use we knew then we had something that was absolutely what we needed to perfect our mattress to the last stage.

Q. Well, who was it took the step from the thought of the eyelet to the step of using the eyelet the way you use it to tie your mattress together?

A. When we first spoke of putting out this never-stretch mattress we started in—it came to our mind again of getting this mattress up along about the—previous to the time we invented it, and that was that we must have a mattress that is inner-tied and smooth and doing away with cotton tufts.

Q. You say you thought you must have such a mattress?

A. In order to have a better mattress than any mattress on the market we should have a mattress without an unsanitary device such as cotton tufts

(Testimony of August Roberti.)

and so forth, which has been a hindrance to the operation of mattresses ever since they were made, and they are unsanitary.

Q. Whose idea was it that you must have a mattress that did not have the little tufts?

A. That was both of our ideas. We both [270] consulted with each other, that if we made a mattress it must be better than any one that was made.

Q. Then proceeding from that point who was it that first worked out this idea of using the eyelets in the two ticks and running the twine through the two eyelets and the tabs and so forth so as to complete the mattress and drawing the mattress together?

A. Well, I first mentioned the idea of using the eyelets as a permanent opening, and there was nothing else to figure out after that excepting how large to make our tabs or strips, whichever we may stitch to, and that was done by our experimenting on the models.

Q. Then as far as the main idea of the invention is concerned do you wish us to understand that the occurrence to you or your brother, or one of you, of the use of an eyelet turned the trick completely and solved the problem and completed the invention?

A. No; that enabled us to finish our patent by using the eyelet as an operating and also a ventilating hole for the mattress, making a mattress that

(Testimony of August Roberti.)

you could conscientiously sell as a ventilating mattress.

Q. Then as I understand it the occurrence to you of the use of the eyelets carried you over the final obstacle; did it? That was the real point in [271] your development of this mattress—

A. No; the eyelet was the last feature that we thought of to perfect a mattress to make it the most salable article.

Q. When you had the eyelet, or the idea of using the eyelet, you had no further troubles in working out a solution of the mattress problem?

A. We had no important trouble, but just a little experimenting as to how and where we placed our tabs and how close together to put them and those little features that were, of course, in an experimental stage.

Q. Then in the position in which you and your brother found yourselves in solving this mattress problem, with the eyelet suggested to one of you the problem was solved; is that the way you wish us to understand the situation?

A. No; we discovered that was what we needed to perfect our mattress.

Q. And when one of you hit upon using the eyelet it was no trouble to go on and complete the idea, was it?

A. Then I went ahead and made my little model evenings; I would work on it at home in my own private sewing-room, experimenting at odd times on this inner construction.

(Testimony of August Roberti.)

[272] Q. You made these models, did you?

A. I made models at home; yes, sir.

Q. When did you make those models?

A. The first model I made, with the eyelet in it, at home, was in about the latter part of September, 1914.

Q. In what part of September did you say, again?

A. In the latter part of September, 1914.

Q. Did you do all the work on those models?

A. On the one I was working on at home. I worked on it in my private sewing-room at home.

Q. Did your brother make any models?

A. He was working on a method of construction at his home, which of course I had never visited at the time he was working on it, although we would talk of his working on these things—talk it over with me at the office.

Q. Well, to your knowledge did your brother make any models of this mattress?

A. Only the ones we worked out later together at the factory.

Q. These September models of 1914, did your brother make any of them?

A. No; that was done at my home.

Q. And did you start on those just as soon as [273] the use of the eyelet occurred to you?

A. Yes.

Q. And your brother didn't co-operate with you at home in working up these models?

A. We would always see each other every day at the office and talk over the business and regular

(Testimony of August Roberti.)

affairs going on in our business, and in that way we would consult one another regarding these features that we would have on this never-stretch mattress.

Q. Was the invention complete in the minds of yourself and your brother, as far as you understood his mind from his statements, when you commenced working upon these models in September?

Mr. GRAHAM.—That is calling for a conclusion of the witness, your Honor, on a question of law, which is for the Court to decide. The facts are before the Court.

The COURT.—He may answer.

A. I could answer that. We knew that making the mattress with the hand eyelet machine would make it so expensive that it would be almost impossible to market it. Then after making the first few mattresses with the hand eyelet machine and finding out that we could get a power machine which would make the work very rapid then we became encouraged to know that the mattress could be made at a marketable price.

[274] Q. In these models did you use metal eyelets or mere perforations in the ticks?

A. Shoe eyelets.

Q. Had you and your brother agreed that the invention was complete in your minds or worked out to solve the mattress problem you were considering when you first started on these models at home in September?

A. We were not convinced until we found that—

(Testimony of August Roberti.)

You know there are 120 eyelets in a mattress, and we knew that unless the eyelets could be placed in this mattress in a rapid manner it would be out of the question to manufacture the mattress at a salable price.

Q. Well, your working on these models didn't—

A. That is, with a hand machine and with a hand operator.

Q. Yes, but that didn't settle the question whether you could make them commercially or not, did it?

A. That settled that it was a good mattress, whether it could be made at a market price or not.

Q. And that you didn't determine until after October 1, did you?

A. When we ordered the power eyelet machine from the eyelet factory and the shoe machine factory we were convinced that by having a self-feeding eyelet [275] machine we could produce this mattress at a marketable price. Then we were convinced that we had something that we would be able to manufacture at a price at which we could continue to make it.

Q. Then, really, the whole kernel of this problem was the idea of using the eyelets and the question of whether you could commercially make the mattresses with the eyelets and put them in cheaply enough so that they would stay; is that it?

A. Yes; we knew we had a combination of ideas that would give us a very marketable product.

Q. Then with this problem before you the oc-

(Testimony of August Roberti.)

currence to you or your brother of the use of the eyelet solved the problem for you, did it not?

A. It helped to solve the problem, being able to make the mattress at a cost that would permit us to sell it.

Q. But these exhibit models have the tabs and cross-strips in?

A. We made the first models in different manners. In sewing these tickings I would take a piece of ticking home large enough to work with, probably 24 inches square, two pieces, and sew these strips—I remember the first model with the inner ticking I made at home was one that would have a strip running across the ticking, and then would drop down, a little drop [276] on this strip, to give us a little countersink, and then I would try it another way, by sewing a tab on in different ways, and finally after having these different ideas before us, with the eyelet right over this strip, we finally decided that the strip would be the only thing to give the mattress a countersunk tufting idea.

Q. And you put these cross-strips in the models in September? A. Yes.

Q. And the tabs? A. Yes, both ways.

Q. And the eyelets? A. Both ways.

Q. And you drew the ticks together by a twine, using a needle passing through the eyelets of the tops?

A. The first samples that were made, they were just made in the inner construction of it, because

(Testimony of August Roberti.)

being mattress makers we could tell by the inside sewing just what would be the results after the mattress was made up, so that we didn't make up a little model mattress until probably along in October.

Q. But you had the idea of the invention all worked out in September?

A. It was worked out, but as to whether we could manufacture it and have it patented—spend the money [277] and have it patented—until we could find out whether we could make it on a paying basis.

Q. When, in your preliminary statement signed by yourself and your brother under oath, being part of Exhibit "F," dated the 8th day of February, 1917, you stated that you conceived of the invention with your brother on or about the first day of October, 1914, you had in mind the fact that your invention really was not completely shown in those models, didn't you?

A. You mean in our blue-prints?

Q. Yes. Well, when you made that oath between you you had in mind that the models didn't exhibit a complete embodiment of the invention, I presume (handing paper to witness).

Mr. BLAKESLEE.—That is a copy of Exhibit "F"; I think it is a true copy.

(Witness examining document.)

The WITNESS.—May I have the question again?

(Testimony of August Roberti.)

Q. (By Mr. BLAKESLEE.) I will restate it; When you made that statement under oath with your brother did you have in mind these models made in September, 1914?

A. I had no occasion to have them in mind.

Q. Well, when you said that the conception of the invention was completed on or about the first day [278] of October, 1914, did you have in mind this work you had done on the models the previous month?

A. There was no inquiry as to what we had done in the way of models, that I remember of.

Q. Well, don't you consider now, and didn't you consider at the time you made this affidavit, this preliminary statement under oath, that those models of September, 1914, exhibited your invention?

A. I didn't feel it was necessary to exhibit those.

Q. Well, now, as a matter of fact did those models exhibit the invention?

A. The mattress in our invention—we speak of the made-up or perfected mattress and not the models.

Q. Now, you stated in this preliminary statement that you first conceived the invention set forth in the declaration of interference on or about the first day of October, 1914. Now that you understood to mean that you first got this invention as a mental concept or mental picture. Wasn't that your idea of the matter when you made this affidavit?

A. Meaning by that that after working on this for some time we had finished our idea of the mat-

(Testimony of August Roberti.)

tress and solved all problems as to how it could be manufactured, then making a perfect mattress.

Q. Didn't you consider the invention as far as [279] the idea of using the ticks, cross-strips, tabs and eyelets and lacing together or drawing together the parts with twine,—didn't you consider that idea was complete in the minds of yourself and your brother at the time you made these models in September, 1914?

A. We didn't feel it was necessary to mention the models. We took it that the perfected mattress would be the necessary feature to produce.

Q. Well, please answer the question. Didn't you consider that those models exhibited the invention, as an invention, irrespective of its commercial form? A. They would.

Q. Were you asked at the time you prepared this preliminary statement whether you had made any models prior to October, 1914?

A. I don't remember.

Q. Did you state to the attorney who prepared this preliminary statement that you had made any such models? A. I don't remember.

Q. At the beginning of the business of marketing these "Sanotuf" mattresses, or at any time thereafter, did you omit the cross-strips from any of the mattresses? A. Not under our supervision.

Q. Do you know of any such instance?

[280] A. I can't recall making a mattress without the strips, but I can recall in experimenting on the cost of production by changing some little fea-

(Testimony of August Roberti.)

tures and locations of features in it, when we first began to manufacture, not getting away from the "Sanotuf" idea, however, in any way.

Q. Did you ever market any "Sanotuf" mattresses without tabs but using the cross-strips and sewing down through?

A. Without certainty, we may have experimented with the mattress in cutting down the expense of manufacturing by leaving a drop or a little slack in the stretch and catching to it; but that was done, if at all, after we had made the mattress this way, and we were still making them both ways at that time, just in an experimental stage.

Q. As a matter of fact don't you manufacture and supply the Eastern Outfitting Company of this city mattresses of the "Sanotuf" type without any tabs?

A. We have supplied the Eastern Outfitting Company with all kinds of mattresses off and on ever since we started in business, and I couldn't say without looking at our records whether the Eastern Outfitting Company had purchased any other "Sanotuf" construction mattress from us at any time without referring to records. That would mean on any one [281] that we had made in an experimental stage. But they all had eyelets in, exactly the same as the "Sanotuf."

Q. Well, haven't you supplied the mattresses commercially without the tabs?

A. On experimental stages at different times we have tried the mattress, working along with the

(Testimony of August Roberti.)

regulation "Sanotuf" mattresses. There was one time I can recall that I had our workroom make a few mattresses with the double sewing and the strip and the eyelet and leaving the tab off; but that was when it went right along through the works with the rest of the mattresses, and we found that after making possibly half a dozen mattresses that they were not as good as the original "Sanotuf."

Q. When was that done?

A. I don't recall, but it must have been from four to five years ago,

Q. You furnished some of those mattresses to the Eastern Outfitting Company, did you?

A. I couldn't say.

Q. If you did did it have the name "Sanotuf" mattress on? A. It would have our label.

Q. On the outside?

A. It would be labeled as a "Sanotuf" mattress.

Q. On the outside of the tick?

[282] A. Yes. Every "Sanotuf" mattress has a label.

Q. Did you ever put out any mattresses commercially with the "Sanotuf" name using just the tabs and not the cross-strips?

A. I can't recall it.

Mr. BLAKESLEE.—That is all.

Redirect Examination.

(By Mr. GRAHAM.)

Q. When you were first experimenting on this mattress with your brother, when the idea of an eyelet was first discussed, did you discuss any other

(Testimony of August Roberti.)

kind of an eyelet? Do you recall any other form of eyelet?

A. We discussed some opening which would form an operating hole, also a ventilating hole, and at different times we tried to figure out how we could place some kind of an opening at this tufting place, until I conceived the idea of the shoe eyelet.

Q. Did anyone in your place of business besides yourself and your brother work on these experimental pieces of ticking and models as you call them?

A. We have a forelady in our sewing room ever since we have operated to a large extent, and she would as a rule do this experimental work for us instead of giving it to one of the other seamstresses, [283] and there is a lady by the name of Louise Burridge, who was our forelady at that time, who did some sewing on those things for us.

Q. Did she do that under the direction of yourself or your brother? A. Both of us.

Mr. GRAHAM.—I think that is all.

Mr. BLAKESLEE.—That is all.

TESTIMONY OF LOUISE BURRIDGE, FOR PLAINTIFFS (IN REBUTTAL).

[284] LOUISE BURRIDGE, called as a witness on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. Please state your name.

(Testimony of Louise Burridge.)

A. Louise Burridge.

Q. Were you ever employed by the firm of Roberti Brothers? A. I was.

Q. In what capacity?

A. Well, as their seamstress and forelady, both.

Q. What was the time in which you were employed there? A. From 1909 to 1914.

Q. And are you employed there at the present time? A. Yes.

Q. You say from 1909 to 1914?

A. Yes; August, 1914, I left there. I beg pardon, I meant 1915.

Q. During that time, from 1911 to 1915, what was the nature of your employment?

[285] A. Well, when I first went there I sewed. I was just sewing, making mattresses. And when I left there I had charge of the department.

Q. Are you familiar with what is called the "Sanotuf" mattress? A. Yes.

Q. You have done a lot of work on that kind of mattress, have you? A. Yes.

Q. Do you recall the circumstances connected with the first manufacture of those mattresses, or prior to that time?

A. Well, I remember we had quite a little excitement about it. Everybody was thinking about getting up a never-stretch mattress, and it was much talked of at that time, and I remember when Mr. August came in first and had me make up some samples on this order.

Q. Now, will you describe what this work was

(Testimony of Louise Burridge.)

that you did at that time? Just the actual work. What was it?

A. Well, he had me cut it a certain size, and then I sat down to one of the machines and sewed the strips across and put the tabs on.

Q. Did you ever have any directions from anyone else about that work?

[286] A. Mr. Ed. and Mr. August both came at different times, and we changed it—sometimes we made the tabs—when we found the tabs didn't work, as long as we had them, we changed them. They stretched. They would discuss it over my head while I was sewing and we would often change it.

Q. Both Mr. August and Mr. Edward discussed the matter in your presence? A. Yes.

Q. As to different ways of making the parts of the mattress; is that correct? A. Yes.

Q. And have you any way of fixing the time when that work took place?

A. No, I have not.

Q. Well, in what part of the year 1915 did you leave the firm?

A. I left there in August. I remember that I went to the World's Fair.

Q. In 1915 in August? A. Yes.

Q. When you left there what kind of machinery were they using for making these mattresses?

A. You mean to put the eyelets in or—

Q. Well, whatever you recollect.

A. We put the strips on and the tabs on with

(Testimony of Louise Burridge.)

the [287] Singer machine and finished it up when we put the eyelets in with the foot-power machine.

Q. How long, if you recall, did they have this foot-power machine before you left?

A. Well, we had it a number of months, I know, because we were turning out a good many of the beds. I remember we had three girls working on them all the time.

Q. And prior to the time when they used the foot-power machine for putting the eyelets in how did they put them in?

A. Well, I remember the little hand-punch we had.

Q. And do you remember how long they used that? A. No, I do not.

Q. Was it some time?

A. I don't remember that.

Mr. GRAHAM.—That is all.

Cross-examination.

(By Mr. BLAKESLEE.)

Q. Do you definitely remember any act in connection with this mattress with the eyelets prior to the first of 1915?

A. I can only remember that we were making them a good many months, but I have no way of fixing any [288] date in my mind at that time.

Q. Did you work on all of the mattresses of that type that were turned out during the first few months?

(Testimony of Louise Burridge.)

A. No; I only made the samples at first. After that others did it under my direction.

Q. Did you observe them as they were turned out? A. I did.

Q. Practically all of them?

A. Yes. It was my business to see that they went out.

Q. You inspected them?

A. I don't know that I took every one in my hands and inspected them, but I had to see that they went out in proper shape.

Q. Did you inspect the interior construction and the way the mattresses were tied together?

A. No; after they left my room I had nothing to do with them.

Q. Well, was that work done in your room?

A. In the tying down of the mattress, that was done in the mattress room.

Q. Was the putting of the tabs and cross-strips in done in your room? A. Yes.

Q. Were the cross-strips omitted from some of [289] those mattresses?

A. Not to my knowledge.

Q. Were the tabs omitted?

A. No. I never remember making any up with loops as described. We might have done it, but I can't recall anything.

Q. You can't recall any in which the eyelets, tabs and cross-strips were omitted?

A. I don't remember doing that. We made them in different ways at different times, but I don't

(Testimony of Louise Burridge.)

remember that. I just remember putting the tabs on and working it out in that way.

Q. You got most of your directions from Mr. August Roberti, did you not?

A. Well, Mr. August was the inside man; but when Mr. Ed. came in he came up and discussed it with me often.

Q. Which did you get your first instructions from as to what was desired of you to be made or what was to be done?

A. I got it from Mr. August, so far as I can remember. Mr. Ed., I think, would have told him to tell me if he wanted it done.

Q. But you got your instructions as to how to make this mattress from Mr. August Roberti to begin with?

[290] A. As far as I remember I did.

Mr. BLAKESLEE.—That is all.

The WITNESS.—I usually took all my instructions from him.

Q. (By Mr. GRAHAM.) But you did have many suggestions from Mr. Edward Roberti, and they also both talked it over and made suggestions together in your presence, did they not?

A. Yes.

Mr. GRAHAM.—That is all. I wish to offer in evidence a certified copy of the interference proceedings involving Interference No. 41,009 between Joseph Avrill and the Roberti brothers. I am *offer-* this because it is complete. The preliminary statements have gone in, but this shows

(Testimony of L. C. Alexander.)

the disposition of the interference by the Patent Office and the awarding of priority to the Roberti brothers.

(Plaintiffs' Exhibit No. 10.)

Mr. GRAHAM.—We rest.

TESTIMONY OF L. C. ALEXANDER, FOR DEFENDANTS (IN SURREBUTTAL).

[291] L. C. ALEXANDER, called as a witness on behalf of the defendants in surrebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Please state your name.

A. L. C. Alexander.

Q. Where do you reside?

A. 936 West 37th Street, Los Angeles.

Q. What is your occupation?

A. Salesman.

Q. Were you ever associated with the Imperial Cotton Works? A. Yes, I was.

Q. Where?

A. First at San Julian Street; that was back in 1912; and we moved from there over to Sixteenth and Hooper Avenue.

Q. Were you present in court yesterday?

A. I should judge for half an hour.

Q. While you were present was one Mr. Avrill on the stand? A. He was not; no, sir.

Q. Do you know a Mr. Avrill?

(Testimony of L. C. Alexander.)

[292] A. Yes, sir, I do.

Q. Was Mr. Avrill ever connected with the Imperial Cotton Works?

A. He was connected as superintendent or foreman at that time.

Q. Who owned the Imperial Cotton Works at that time, do you know?

A. Why, I think it was a corporation. Mr. Edward Fox was the head of it.

Q. And what was the business of the Imperial Cotton Works?

A. Making mattresses and comforters.

Q. And what was your position with that company?

A. I had charge of the comfort department and the stock, stock clerk, at times, and at other times I was in the mattress department.

Q. Now, at the Imperial Cotton Works did they have a showroom? A. Yes, sir, they did.

Q. And did they have an office? A. Yes, sir.

Q. Now, where was the showroom with relation to the office?

A. They were both in the same room. I should judge it was a room about this size or nearly this size.

[293] Q. And do you know a Mr. Edward Roberti and a Mr. August Roberti?

A. I know them by sight.

Q. Are they present in court?

A. They are; yes, sir.

Q. Now during the time you were with the Im-

(Testimony of L. C. Alexander.)

perial Cotton Works do you know of your own knowledge whether you ever saw Mr. Edward Roberti at said cotton works?

A. Yes, sir, I have.

Q. Approximately how many times?

A. I should judge I have seen them in there in the neighborhood of eight or ten times.

Q. Did you have any conversation with him?

A. No, sir, not to my knowledge.

Q. Do you recall of your own knowledge whether you ever saw Mr. Fox have any conversation with Mr. Ed Roberti? A. Yes, sir, I have.

Q. Did you ever see Mr. August Roberti at the Imperial Cotton Works?

A. Not to my knowledge.

Q. Do you know of your own knowledge whether Mr. Avrill ever invented any mattress while at the Imperial Cotton Works?

Mr. GRAHAM.—I object to that as calling for a conclusion of the witness, as to whether he invented a [294] mattress. If Avrill got up a mattress and this witness knows about it, let him describe the mattress.

The COURT.—He may answer whether he knows of his working on any invention of his.

A. Yes, sir, he was working on a mattress.

Q. (By Mr. BROWN.) What was that mattress?

A. At first he worked on a mattress with an eyelet with a silk cord through the eyelet—a laced mattress he called it. He made quite a number

(Testimony of L. C. Alexander.)

of them, and then he changed that later on and put a strip under those eyelets to reinforce those eyelets across that mattress.

Q. And where were the eyelets?

A. They were both in the upper and lower tick.

Q. Where was that mattress placed?

A. That mattress was first placed in what you might call a shelving in the workroom where we kept a lot of stock, and afterwards it was taken into the office, into what we call the showroom.

Q. Now during the visits you have mentioned in which you saw Mr. Ed Roberti did you ever see him looking at that mattress?

A. I saw him looking at that mattress. Mr. Fox brought him out from the office, and that mattress was lying on the side over from his desk, and I saw Mr. Edward Roberti look at the mattress at the [295] solicitation of Mr. Fox. Why my attention was called to it was the fact that Mr. Avrill and I were over at the other side, near a small machine of comforters, and Mr. Avrill cursed Mr. Fox for disclosing that mattress to Mr. Roberti.

Q. Did you hear any of the conversation or what took place at that disclosure? A. I did not.

Q. How close were you to Mr. Fox and Mr. Roberti at that time?

A. Well, I should judge in the neighborhood of 40 feet. It was in a room probably—the dimensions must have been 150 by 100.

Q. Now did you see Mr. Edward Roberti on any other occasion examining that mattress?

(Testimony of L. C. Alexander.)

A. I did not.

Q. Did Mr. Edward Roberti examine the mattress on that occasion?

A. He took hold of it just the same as a mattress-man would look it over.

Mr. BROWN.—That is all.

[296] Cross-examination.

(By Mr. GRAHAM.)

Q. Where was this mattress that you say Mr. Avrill made first placed after it was completed?

A. At the side of his desk.

Q. Where was his desk located?

A. In the workroom.

Q. Well, where in the workroom?

A. Right at the side of the door as you come out of the office.

Q. Which room was it that you said was about as large as this room? A. That was the office.

Q. The office was as large as this room?

A. It contained the showroom and stock of ticking.

Q. Now where was the shelving where you say this mattress was first placed?

A. It was first placed in the workroom.

Q. You said it was placed on some shelving, did you not?

A. We had shelving to stack our mattresses in.

Q. Where was the shelving?

A. Right outside of the office door, where you came out of the office. There were fireproof doors there between those rooms.

(Testimony of L. C. Alexander.)

[297] Q. Now what was the office like—were there desks in it?

A. They had a rack for mattresses; tables for stacking bolts of ticking on, and comforter cases to put comforters in.

Q. Did you have a stockroom?

A. That was the stockroom, combined.

Q. The office was a stockroom?

A. Office, showroom and stockroom.

Q. All three in one, combined? A. Yes, sir.

Q. Now where was the sewing-machine you refer to?

A. That was on the other side of the workroom.

Q. How big was the workroom?

A. I should judge it was 150 by 100. This was the mattress-room too, you might say and contained a scroll-room too where we scrolled the comforters.

Q. Now you say the sewing-machine was on the other side of the workroom and the workroom was 150 feet. Is that correct?

A. Or along there. Well, it was about 100 wide, and this was the short width.

Q. Where was the door from the office to the workroom located?

A. You might say they were—the only thing that [298] separated them was just the corner. One office door here, and right around here was the other.

Q. Now where was the sewing-machine with relation to that door?

A. It was just opposite, on the other side of the room.

(Testimony of L. C. Alexander.)

Q. At least 100 feet away?

A. No, it wasn't.

Q. You said the room was 100 feet across.

A. But those machines were not up against the wall. That machine had a space of 12 feet wide.

Q. And how near to the wall was it?

A. It was probably six feet from the wall.

Q. And you and Mr. Avrill were at that machine?

A. We were on this side of that machine, yes.

Q. Where was the mattress when you testified Mr. Roberti saw it?

A. It was just as you come in the door into the workroom. Right opposite there was a little desk, like, nailed up against the wall for Mr. Avrill, and right opposite that—that desk was not over four feet long, and separated those wooden bins you might say.

Q. What else was on those shelves?

A. Other mattresses.

Q. Quite a number of mattresses there, were [299] there not?

A. Well, I suppose those two tiers of mattresses would probably hold 150 mattresses in there.

Q. I see. And those shelves were filled with mattresses. Then you were at least 80 feet away from where you say Mr. Roberti was looking at the mattress; is that correct?

A. No; I should judge in the neighborhood of 70.

Q. Do you mean to say that at a distance of 70 feet you could tell which mattress he was looking at?

A. Yes, because this bin or section in this con-

(Testimony of L. C. Alexander.)

struction that had the old mattress in, the finished product, was the only one in there.

Q. You just said a few minutes ago that the shelving where this mattress was was filled with mattresses.

A. No; those shelves were to hold finished product, to keep them off the floor. There was a top and bottom and middle tier. The bottom tier probably was as high as that—

Q. Then you make that statement from the conclusion that because he pulled out a mattress where this mattress of Mr. Avrill's usually was, that it was Mr. Avrill's mattress; is that correct?

A. I didn't get that.

(Last question read.)

[300] A. There is no conclusion about it. I am positive of it.

Q. How do you know it?

A. Because the mattress was there, and I saw Mr. Fox show it to Mr. Roberti.

Q. Well, you were seventy or eighty feet away, were you not?

A. Well, we kept that mattress there.

Q. Did you go over and look at the mattress to know it was his mattress?

A. I knew it was Mr. Avrill's mattress.

Q. How did you know it?

A. Because I had worked on it.

Q. You don't know that that was the particular mattress Mr. Fox showed Mr. Roberti, do you?

A. Yes, sir, I do.

(Testimony of L. C. Alexander.)

Q. How do you know it?

A. Because it was the only mattress in that bin.

Q. Well, because it was the only mattress in that bin is the reason you say it was Mr. Avrill's mattress that Mr. Fox showed to Mr. Roberti?

A. I don't know whether Avrill claimed the ownership, but that was the one he and I worked on, and it was the only one in that bin that was shown to Mr. Roberti.

Q. Well, that is the only reason you say it was [301] that mattress, is it not, because it was the only one in the bin?

A. It was the only one of that construction in that bin.

Q. There might have been some other mattresses there temporarily and Mr. Avrill's might have been somewhere else?

A. I know it because it was taken from that bin. It was put in there, and we very seldom kept anything in that one bin.

Q. Now this bin you speak of was not in the showroom, was it? A. No.

Q. It was in the workroom?

A. It was in the workroom.

Q. Did you ever see that mattress anywhere else?

A. It was taken in afterwards with the other samples into the showroom.

Q. How long was it in that workroom?

A. It probably lay there three days at the most.

Q. When was that, if you can recall?

(Testimony of L. C. Alexander.)

A. Well, I think that was in the latter part of 1914 or early in 1915.

Q. Are you positive it was in 1914?

A. I wouldn't be exactly positive, just around the exact dates, but I know it was before the Imperial [302] Cotton Works failed.

Q. When did that company fail? Did you leave there at that time?

A. I did. That was in the early part of 1915 I know.

Q. But you don't recall when?

A. No, I don't know the exact date of their failure.

Q. Was it in February?

A. I couldn't say it was in February, or March, but it was early—some time about that.

Q. Were you ever at the business place of Roberti Brothers?

A. Not to my knowledge. I might have gone over there once or so to deliver a message over there, or a piece of goods, or something like that.

Q. Did you ever talk to anybody about mattresses while you were there—or with anyone from Roberti Brothers?

A. Not to my knowledge. Not at that time.

Q. Didn't you know at that time that Roberti Brothers had a mattress that was different from the old style? A. No.

Q. Are you positive of that?

A. I am positive of it.

(Testimony of L. C. Alexander.)

[303] Q. You never talked to any person about it? A. No.

Q. You talked with Mr. Avrill about his mattress, didn't you?

A. Well, I didn't even know about what he was driving at at that time when he was putting the construction of that strip in there with the eyelets.

Q. Do you know what the construction was?

A. Well, all I knew, he put a strip there; I thought it was to reinforce those eyelets.

Q. Now what was the construction of that mattress you say you saw on the shelf?

A. It just had eyelets in. We had been making eyelets there for a year and a half to my knowledge, and over at the old San Julian place we used the eyelets in comforters to make a self-ventilating comforter. That was back in 1912 and 1913 or 1914, we made the eyelet mattress with a lace cord through it.

Q. When did you stop making that mattress with the lace cord through it?

A. We never did stop. It was just a question of demand that stopped them.

Q. Well, whose idea was that?

A. That was Mr. Avrill's.

Q. Now when was this mattress made that you [304] have referred to as being Mr. Avrill's, that you had on the shelf?

A. It was in the latter part of 1914 or early in 1915, just before they failed. That is the only one I remember of putting in that strip.

(Testimony of L. C. Alexander.)

Q. Well, how else was it made?

A. Well, except that instead of interlacing the cord through the eyelets he made ties similar to the inner tuft. The inner tuft would be just taking the regular mattress knot, the same as you would over a tuft, but eliminating the tuft and letting the knot drop within the eyelets so that it would be inside.

Q. Now, was that made in December of 1914 or in January of 1915 or February of 1915?

A. To be exact, I couldn't swear.

Q. You have no way of saying?

A. I know it was just before they failed, and I never knew what became of the mattress.

Q. How did you know it was Mr. Roberti that was talking with Mr. Fox?

A. Because he came in there a number of times, and I think one time I took a piece of goods over to his factory.

Q. Did you ever talk to Mr. Roberti? A. No.

[305] Q. Were you ever introduced to him?

A. No; I just knew him by sight, just the same as to-day, just from seeing him. In fact, most employees don't come in contact with the employers of other concerns, although we may know them by sight.

Q. Well, did you know at that time it was Mr. Roberti? A. Just through Mr. Fox.

Q. Which Mr. Roberti was that?

A. It was Mr. Ed Roberti, the gentleman on your right.

(Testimony of L. C. Alexander.)

Q. Prior to coming to testify here to-day who have you talked to with relation to these matters?

A. Why, I have talked this "Sanotuf" mattress for the last six years anyway.

Q. Well, I mean with respect to testifying in this case? Did you talk to Mr. Avrill?

A. Yes, sir. I have known Mr. Avrill for years.

Q. You went over the circumstances with him, did you? A. No, sir, I did not.

Q. You didn't talk anything about the circumstances? A. Talked about the case, yes.

Q. You didn't talk anything about this [306] conversation that you had with Mr. Avrill at the sewing machine? A. No, sir.

Q. You didn't talk anything about Mr. Roberti being in the factory of the Imperial Cotton Works?

A. No, I don't think it was ever mentioned.

Q. None of that was mentioned until you were on the stand; is that correct?

A. No, not through Mr. Avrill.

Mr. GRAHAM.—That is all.

Q. (By Mr. BROWN.) When did I first ask you to become a witness, Mr. Alexander?

A. This morning here when I first came in.

Q. And did I have any conversation with you as to testifying? A. No, sir.

Mr. BROWN.—That is all.

Q. (By Mr. GRAHAM.) Are you in the business of manufacturing or selling mattresses?

A. Not to-day; no, sir.

(Testimony of L. C. Alexander.)

Q. You are not interested in the manufacture or sale of mattresses?

A. No, sir, I am not connected with any mattress firm. In fact in the last two years I have been in the real estate business.

Mr. GRAHAM.—That is all.

TESTIMONY OF JOHN SCANLON, FOR DEFENDANTS (RECALLED IN SURREBUTTAL).

[307] JOHN SCANLON, recalled on behalf of the defendants in surrebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Mr. Scanlon, while you were associated with the firm of Roberti Brothers did they put out more than one form of "Sanotuf" mattress?

A. Well, when the mattress was first made they didn't call it "Sanotuf," and before very many were made, we made a few of them that were put out, but of course they were not satisfactory for three or four weeks after they started to make them.

Q. In what way were they not satisfactory?

A. Well, I will tell you. The trouble of it was the eyelets staying in—they had a large eyelet at that time for a while. They had experimented with different eyelets. They had a blue eyelet, and black ones, and different kinds, and they were too large, and of course they eliminated that, and they made

(Testimony of John Scanlon.)

some—because I made the model of the small ones, and I made two or three of the large ones at that time, and of course the mattress-maker would put them on—I don't suppose he made over three or four dozen, and they made them without the strip. Of [308] course that idea was to eliminate labor. And the eyelets wouldn't hold on cheap ticking, because an eyelet wouldn't stay in cheap ticking, that kind of eyelets, because they would pull out, and you had to put a strip under there, and that would make your goods thicker and your eyelet would hold better.

Q. Were any mattresses made for distribution to the trade, do you know, of your own knowledge, that were without the cross-strips?

A. Yes, there was a few made. I will say about three or four dozen. They were not satisfactory, and then they had to eliminate that. Because I know the first ones I made didn't have the strips on them first and we had an awful time making them. It took some time to perfect them, because at that time we used the double-point needle and that wasn't satisfactory; we had to use the single-point, thereby making them quicker, and you take on a good heavy tick the eyelets will hold, but if you use a thin tick they will not hold as good.

Q. Now can you fix the year that the several dozen mattresses you have testified about that didn't have the cross-strips were put out?

A. Well, I know it was in 1914, the time they mention. Around that time. But I couldn't give

(Testimony of John Scanlon.)

any dates or anything like that, but it was in the [309] latter part of 1914. But before they sent out many of them they caught that. They didn't send out over three or four dozen I think. The name "Sanotuf" I don't think got out until about 1915.

Q. Now during the term of your employment did you know a Miss Burridge, who testified this morning? A. Yes.

Q. Was she there?

A. Oh, yes, she was there.

Q. Do you know of your own knowledge whether any mattresses were put out at that time that had the cross-strips without the tabs?

A. Well, I don't seem to remember that so well. It seems to me like we did too. We might have made a few, but I don't think there was many of them made. That wouldn't hold as good with the tab in there. You get a better bite with your tab if you put on the cross-strip.

Q. Did you do any experimenting on the "Sanotuf" mattress?

A. Well, in regard to the experimenting, that was making the little samples. I made most all of them. I didn't make, really, the first one or two of the big ones. At that time there wasn't much business and the mattress-makers, there were only a few there, and we worked on the rack off and on and [310] handled the other part too, and I know we had an awful time making them at that time, because it was a new thing, but after they got

(Testimony of John Scanlon.)

it down where they had the tab and strip and got the proper kind of eyelet and everything of course it went along all right.

Q. Are you familiar with all the experiments made?

A. Well, I am familiar with all the mattresses that were made, the large ones and small ones, at that time, and samples. Not the ones they worked on. Of course they worked on their little forms and things outside of what I did.

Q. Did you see those forms?

A. Yes, I saw some of them.

Q. Now do you recall what the first thing that you ever did in the making of the "Sanotuf" mattress was?

A. Well, the first ones that I recall were just when they got the little ones made there was an eyelet in it and a tab only. That was the first ones.

Q. And what was the second one?

A. Well, after we made the first few dozen, whatever it was, I don't know whether it was two or three or four dozen, we found out that on the cheap ticks the ticks would pull off and the eyelet wouldn't [311] hold good on account of the thickness of the material and we had to put that strip across. There were several features connected with that. It would make the eyelet hold more securely, and also take the stretch out. Well, ticking will not stretch, but of course the mattress will stretch. Anything tied down will stretch when it spreads out.

(Testimony of John Scanlon.)

Q. And what was the third thing that was done in the making of that?

A. Well, as far as the third thing is concerned, I don't know. The idea was to get it out on the market and sell it.

Q. As a mattress-maker I would like to ask you whether or not in your opinion the tabs being pulled down through the filling of the mattress prevents the shifting of the filling.

A. Prevents shifting?

Q. Yes.

A. Well, I will tell you. Referring to the filling of the mattress, the "Sanotuf" mattress, I made a statement here before, on both of those mattresses, that I never did regard them as being so much with the cheap filling. With a cheap filling they are not as good. If you have a good filling in them they are a good mattress to a certain extent, because they will hold up, but with the cheap fillings [312] in them, or inferior grades, they can't tie them down, because there is no body to them, and they will shift, in the cheaper material. In long staple cotton they are a good mattress in that way, but outside of the long staple cotton, and hair, and good grades of floss it is very inferior in some respects.

Q. Have you ever renovated any mattresses?

A. Yes.

Q. Have you ever renovated any "Sanotuf" mattresses? A. Yes, I have.

Q. How do you do it?

(Testimony of John Scanlon.)

A. Well, have the boys take them apart, and, as a rule, you can make them over—you can make them over, but we generally put tufts through them, because if we make them over for anybody else we just tuft them ordinarily, because sometimes the eyelets are out or the tabs are pulled off, and small shops can't make them over as readily as the large manufacturer can.

Q. Did you hear the testimony this morning of Mr. Edward Roberti and Mr. August Roberti when they were on the stand? A. Yes.

Q. As to making over the mattresses through the eyelets, being able to secure the cord?

[313] A. Yes, you can secure the cord again if they are not broken out—secure the tab—but if they are not sewed right, or if a stitch breaks in those tabs at any place the whole tab, as a rule, will pull loose, and in making the "Sanotuf" or any of those mattresses the stitchers as a rule—it is their own fault lots of times—stick the needle in the cord or thread, and if you cut one thread the whole tab will come out, and of course you have to fix that in again by—

Q. Now as to ventilation, as a mattress-maker and renovator would you say by beating that mattress, Plaintiffs' Exhibit 9, air would be drawn into the mattress and renovate or lift up the filling of the mattress so as to make it lighter?

A. Well, I suppose a certain amount of air is in it; but as far as ventilating the mattress is concerned, I don't see how air could pass through from

(Testimony of John Scanlon.)

one eyelet to another. I don't understand it. There is a certain amount of air spaces in there, probably, at certain times, but the air can't pass through a mattress.

Q. Now during the term of your employment with Roberti Brothers did you at any time work on a mattress which had an eyelet in both ticks and a lacing through the eyelets back and forth for drawing the [314] ticks together?

A. We never used any laces. That lacing idea, as I understand, they used to have two eyelets in it, and they would lace them. But they never do anything like that; in fact I don't know what—

Q. Now, who gave you your directions as to making these models of "Sanotuf" mattresses?

A. Well, of course the directions came through the proper channels. Mr. August. The only thing of it was, he had charge of the place and when the little forms or little samples were made, just about a couple of feet square, we would fill them—of course ordinarily with the best cotton, like white staple.

Q. You talked the matter over first with Mr. August Roberti? A. Yes.

Q. You received your instructions from him, did you? A. Yes.

Q. And did you with Mr. Edward Roberti?

A. Oh, yes. Well, we talked together there on different occasions.

Q. Who gave you your instructions as to making mattresses or how to make them?

(Testimony of John Scanlon.)

A. Well, I could see how they were made, that is, [315] as far as the construction was concerned, at that time. Of course, as I say, there were unnecessary things eliminated, such as placing your eyelet the right distance from the tab, and one thing and another.

Mr. BROWN.—That is all.

Q. (By Mr. GRAHAM.) What are these models you have referred to?

A. Little samples that they made to go out to different furniture stores.

Q. In other words, salesmen's samples?

A. Yes, sir.

Mr. GRAHAM.—That is all.

Mr. BROWN.—That is all.

(A recess was thereupon taken until 2 o'clock P. M.)

[316] AFTERNOON SESSION—2 P. M.

The COURT.—Proceed, Gentlemen.

Mr. BROWN.—Mr. Malerstein.

TESTIMONY OF HARRY E. MALERSTEIN, FOR DEFENDANTS (RECALLED IN SUR-REBUTTAL.)

HARRY E. MALERSTEIN, recalled as a witness on behalf of the defendants in surrebuttal, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. Mr. Malerstein, in your factory do you ever

(Testimony of Harry E. Malerstein.)

repair or renovate mattresses outside of manufacturing mattresses for the trade?

A. We sometimes do make over mattresses.

Q. Have you ever renovated a "Sanotuf" mattress? A. Yes, sir.

Q. Can you name any specific instance?

A. Yes; there was once a mattress was brought in from a store to be made over with a new tick, on account of being spread.

Q. Have you any such tick? A. Yes, sir.

Q. Will you produce it, please?

[317] A. It is here (producing same).

Q. Where did you get that tick from?

A. From a furniture store.

Q. Which one? Who, specifically?

A. It was the Eastern Outfitting Company.

Q. And did it come into your possession from them direct? A. Yes, sir.

Q. Did you receive it? A. Yes, sir.

Q. And what type of mattress is that?

A. This was a felt mattress of "Sanotuf" construction.

Mr. BROWN.—Do you admit that is a "Sanotuf"?

Mr. GRAHAM.—We admit it was a tick from one of our mattresses. Do you offer it in evidence at this time?

Mr. BROWN.—Yes.

Mr. GRAHAM.—We object to this as not being a complete mattress. If it is for the purpose of showing the spreading of the mattress I don't see

how it is material unless we have the whole mattress here. It is simply the covering of the mattress or the tick.

Mr. BROWN.—The purpose is not to show spreading, if the Court please, but is to show a variation [318] in the manufacture of "Sanotuf" mattresses.

Mr. GRAHAM.—And it is objected to as entirely immaterial whether the plaintiffs in this case ever made a different form of mattress or not. The question here is the patent in suit and whether the defendants infringed that patent. If the plaintiffs made other forms of mattress it is entirely immaterial.

Mr. BROWN.—If the Court please, this morning the testimony was to the effect that they had made other forms of mattresses and sold other forms.

The COURT.—Yes; there seems to be no dispute about that.

Mr. BROWN.—And we wish to introduce this particular tick for the reason that it shows a variation in the manufacture of "Sanotuf" mattresses.

The COURT.—It may be introduced although I suppose it is just cumulative with the statements that have been made before, they not denying that they have made a variety of them.

Mr. BLAKESLEE.—It may go as to the value of this alleged invention.

The COURT.—That would not necessarily prompt an inference to that effect because the expense of manufacture and various qualities and cheapness

(Testimony of Harry E. Malerstein.)

might all enter into it and would bear explanation. We [319] can't necessarily assume because the different mattress is exhibited that they made that mattress because the other wasn't satisfactory. I will allow it to be introduced and you may argue the effect of it.

Mr. BROWN.—We wish to introduce this into evidence as Defendants' Exhibit "U."

Q. I wish that you would describe this particular mattress or tick and its construction as shown there in Exhibit "U."

Mr. GRAHAM.—That is objected to, your Honor. The mattress or tick speaks for itself. It is plain how it is constructed.

The COURT.—He can for the purpose of the record describe it.

A. According to the make of the "Sanotuf" it is supposed to have a tab in there which is allowed for the allowance of the tick. This tab is sewn close to the ticking which you necessarily would have to allow that much goods in that mattress just on account of the construction of the mattress. The pull is from the top and not the inside of this so therefore that mattress stretched during the time it was used. There was an allowance in this mattress as much as in a common mattress, This tab over here is sewn flat right on the tick and if there [320] would be no tab or strip at all it would be the same thing. The reason why a mattress does stretch is for the simple reason that there is an allowance in that tick for pulling down the tufts

(Testimony of Harry E. Malerstein.)

and the only way to overcome this and the only way to improve a mattress, aside from putting in a better filling there, which any manufacturer tries to do, is to get away from the stretching part of it. To get away from it the only thing is not to put any excess goods in that mattress. In this mattress it is plain to be seen that they have allowed goods in there and therefore it stretches.

Mr. GRAHAM.—I object to this whole line of testimony as being entirely immaterial and move to strike it out.

The COURT.—The motion will be denied and an exception taken.

Mr. BROWN.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. The fact that that tab, as you call it, is close to the tick, the amount of pull down or unevenness of the surface of the tick would be due, wouldn't it, to the length of the ties?

A. Well, in order to tie up a mattress you have [321] to pull it down as tight as the strings will pull themselves; otherwise it will not hold the filling inside in position.

Q. Then the ties do have the effect of holding the filling in a certain position, do they?

A. Yes, but you have to pull it down tight.

Q. Then the string ties do have the effect of holding the filling in a certain position?

A. Naturally.

(Testimony of Harry E. Malerstein.)

Q. Then the tabs of the Roberti mattress also have that effect to a greater extent, don't they?

A. Well, if they are hanging down loose inside they take up the slack, which in a common mattress would not be allowed.

Q. But if the ties will prevent the shifting of the filling, simply the string ties, then the tabs depending in the filling as made in the Roberti mattress will prevent a shifting to a greater extent than the strings, won't it? A. Yes, it will.

Mr. GRAHAM.—That is all.

Mr. BROWN.—That is all. We have no further witnesses.

Mr. GRAHAM.—Now, about the argument, your Honor, it will take considerable time. I imagine it will take two or three hours at least.

[322] The COURT.—Well, I don't know that I have a long stretch of time here that I can pick out.

Mr. GRAHAM.—In fact, if we go into this case as I would like to go into it, and into the testimony, it would take longer than that for my argument.

Mr. BROWN.—Does the Court prefer briefs?

The COURT.—I would rather leave that to the preference of the counsel, or I will hear the argument and consider the matter later.

Mr. GRAHAM.—Judge Trippet, your Honor, in several cases that I have been connected with permitted briefs to be filed and then after he had considered the briefs he indicated any portions of the case that he desired to hear argument on. I

don't know whether such a plan would meet with your Honor's approval or not. In that way it seems to me that the Court would have the facts of the case and the law right before it and the points desired to be brought out could be discussed and the matter finally determined much more readily than otherwise.

The COURT.—You might do that and I will endeavor to leave some day aside, or a large part of a day, in the future after the briefs are in for the argument, as early as I can. All of next month will be the criminal month here and one half of the month following. What time do you want to file briefs in?

[323] Mr. GRAHAM.—Say ten days?

The COURT.—Is that enough on each side?

Mr. BROWN.—Oh, yes.

The COURT.—Suppose we make it ten, ten and five and I will keep it in mind and endeavor to hold its place and consult with you before I fix the time.

Mr. BROWN.—Of course in the argument on behalf of defendants we have set forth certain prior art which makes it a little difficult arguing prior art in a brief, but I shall attempt to do so.

The COURT.—As I say, I want to try to arrange the oral argument to suit the preferences of counsel.

Mr. BROWN.—An oral argument on the prior art would assist very materially. Then if this Court could indicate, as Mr. Graham has suggested,

as to certain things that the Court would like further argued, we will be very glad to argue those things, to clarify the issues.

The COURT.—I will leave it to you now to decide whether you want first an oral argument or a brief. If you can agree between yourselves I will find the time.

Mr. BROWN.—I believe that a little argument on the prior art would be in keeping at this time.

The COURT.—Mr. Blakeslee, are you preparing to argue the Layne & Bowler case on the 14th?

[324] Mr. BLAKESLEE.—I put that up to the defendants' counsel and ask them to notify your Honor's secretary and ourselves if that date would not be convenient and I have not heard a word from them. I will make it a point to call them up and inform your Honor's secretary about it.

The COURT.—I was going to say I can give you all of that day if that argument is not on, and that is next week.

Mr. BLAKESLEE.—I will inquire of counsel and phone your Honor's secretary. Did your Honor have in mind that if we didn't take that day in that case you would devote it to this case?

The COURT.—Yes; I can give you all of that day if that other argument is not ready.

Mr. BLAKESLEE.—My thought on this, while I sha'n't take part in the argument more than perhaps to say a word or two, is that it would be helpful to your Honor to have an outline of this

case to begin with, particularly on this prior art matter. Mr. Brown can lay the patents successively before your Honor and briefly point them out and that will be more convenient than briefing it, and then perhaps touch on one or two more things, and it seems to me it will curtail the briefing procedure considerably.

The COURT.—Suppose we set this down for the [325] 14th now and try to arrange some other time for the Layne & Bowler argument. That will be perhaps better.

Mr. BLAKESLEE.—Yes.

The COURT.—I will set it then for the 14th. I would rather put the argument over to that time than to hear it now because I will be nearer to the time I can work on it than I am now.

Mr. GRAHAM.—Then we will submit an oral argument at that time?

The COURT.—On the 14th, yes. I imagine you can displace the Layne & Bowler case without much inconvenience, can you not?

Mr. BLAKESLEE.—I think we can take it up on very short notice any time as soon as we can get all of counsel here.

The COURT.—Yes.

Mr. GRAHAM.—Your Honor, with respect to the unfair competition it is understood we are not pressing any claim against the use of the word "Tiednotuff" or of the word "Restmore." And is your Honor going to hear an argument as to the joinder of those?

The COURT.—No, not if you are not pressing the claim, if that is understood, and is not relied upon.

(A recess was thereupon taken until February 14, 1924, at the hour of 10 o'clock A. M.)

[Endorsed]: No. 4454. United States Circuit Court of Appeals for the Ninth Circuit. J. H. Jonas, Doing Business Under the Firm Name of J. H. Jonas and Sons, Jacob H. Jonas, Max I. Jonas, David A. Jonas, and Harry J. Malerstein, Appellants, vs. August Roberti, Jr., and Edward L. Roberti, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed January 2, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.